IN THE INCOME TAX APPELLATE TRIBUNAL
"A" BENCH: BANGALORE

BEFORE SHRI WASEEM AHMED, ACCOUNTANT MEMBER
AND
SHRI KESHAV DUBEY, JUDICIAL MEMBER

ITA No.1054/Bang/2024
Assessment Year: 2020-21

IIFL Samasta Finance Limited 110/3, Lalbagh Main Road Krishnappa Layout, Delhi Bangalore 560 027 **PAN NO : AAACC4577H**	**Vs.**	DCIT Circle-6(1)(1) Bangalore
APPELLANT		**RESPONDENT**

Appellant by	:	Sri H.V. Gowthama, A.R.
Respondent by	:	Sri Chinmay Anand Jain, D.R.

Date of Hearing	:	03.07.2024
Date of Pronouncement	:	27.09.2024

O R D E R

PER KESHAV DUBEY, JUDICIAL MEMBER:

This appeal at the instance of the assessee is directed against the CIT(A)/NFAC's order dated 04.04.2024 vide DIN & order No. ITBA/NFAC/S/250/2004-25/1063899459(1) passed under Section 250 of the Income Tax Act, 1961 (the Act) for the Assessment Year (AY) 2020-21.

2. The assessee has raised the following grounds of appeal: -

"*1. a) The Ld. Commissioner of Income Tax (Appeals), erred in law and facts by confirming the order passed by the Ld. Assessing Officer levying a penalty of 50 percent of tax under the provisions of section 270A(7) of Income Tax Act, 1961 for under-reporting in respect of claim of deduction of employees contribution remitted after the due date as per provisions of Provident Fund Act.*

b) The Ld. Commissioner of Income Tax(A) erred in law and facts by confirming the order passed by the Ld. Assessing Officer levying a penalty of 200 percent under section 270A(8) of Income tax Act, 1961 in respect of Cess claimed as deduction while arriving at taxable income as misreporting.

2. *a) The Ld. Commissioner of Income Tax(A) erred in law and facts by confirming the order passed by the Ld. Assessing Officer for levy of penalty on the claim made by the Appellant in respect of employees contribution of Provident Fund remitted after the due date as per provisions of Provident Fund Act but paid before the due date for filing the return as per section 43(b) of Income tax Act, 1961, which was claimed based on jurisdictional High Court order as well as the orders passed by the Honourable ITAT, Bengaluru Bench.*

b) The Appellant submits that before the amendment carried out for Explanation-1 by the Finance Act 2021 with retrospective effect from 2021-2022. Honourable High Court of Karnataka as well as ITAT Bangalore Bench were allowing the employees contribution of Provident Fund remitted before the due date for filing the return of income. Hence, there is no underreporting of income for which the penalty u/s.270A (7) has been levied.

3) *a) The Ld. Commissioner of Income Tax(A) erred in law and facts by confirming the order passed by the Ld. Assessing Officer levying a penalty u/s.270A(8) of Income tax Act, 1961 of 200 percent of tax on claim of Cess as expenditure under Income tax computation.*

b) The Appellant submits that based on various judicial precedent of Hon'ble High Court of Mumbai, the Appellant Company had claimed Cess on Income Tax as expenditure while submitting the return of income.

4 *The Appellant further submits that based on the amendment carried out by Finance Act 2022 with retrospective effect from 2005 onwards the Cess on Income Tax was brought to tax including word 'Cess' along with taxes u/s.40(a)(ii) of Income tax Act, 1961.*

5) *The Ld CIT(A) erred in law and facts by disregarding the bonafide intent of the Appellant and neglecting the judicial precedent laid down by the various Hon'ble High Courts when the said amendment was not effective (i.e at the time of filing of return/ timeline of filing revised return).*

6) *The Ld CIT(A) erred in law and facts by not appreciating the bonafide disclosure of the material facts by the Appellant wherein the Appellant had submitted the letter enclosing rectified computation before completion of the assessment, withdrawing the claim made towards deduction of Income tax Cess, as the revised return could not be filed due to impossibility of performance.*

7) The Ld CIT(A) erred in law and facts by upholding the rejection of immunity from penalty despite of filing Form 68 as per the provisions of Section 270AA of the Income tax Act, 1961 wherein the due taxes had already been remitted to the revenue authorities. The Appellant would like to draw the attention of Honourable members of ITAT that on a similar matter, the High Court of Rajasthan in the case of GR Infra Projects Ltd. Vs ACIT, 158 Taxmann.com 80 (Rajasthan) held that the Appellant is rightly entitled to benefit of immunity as per the provisions of section 270AA of Income Tax Act.

8) For the above and any other grounds that may be advanced at the time of hearing, the Appellant prays Honourable ITAT to delete the penalty levied."

Any consequential relief, to which the Appellant may be entitled under the law in pursuance of the aforesaid grounds of appeal, or otherwise, may be thus granted. The Appellant may kindly be given an opportunity of being heard under the principles of natural justice.

All the above grounds of Appeal are without prejudice and notwithstanding each other.

The Appellant craves leave to add, alter, omit or substitute any or all of the above grounds of appeal, at any time before or at the time of appeal, to enable the learned Commissioner of Income Tax(Appeals) to decide the appeal according to law.

3. Brief facts of the case are that the assessee company is in the business of Micro finance which is approved by Reserve Bank of India as NBFC filed its return of income for the assessment year 2020-21 on 13.02.2021 declaring total income of Rs.126,85,87,430/-. Thereafter, the AO completed the assessment u/s 143(3) r.w.s. 144B of the Income Tax Act, 1961 (in short "The Act") on 16.9.2022 assessing the total income at Rs.128,25,28,401/- by making the following disallowances-

a) Employees contribution of Provident Fund amounting to Rs.16,61,049/- u/s 36(1)(va) of the Act.
b) The education cess amounting to Rs.1,22,79,936/- claimed as deduction u/s 37 of the Act.

3.1. Before leaping straightway to the penalty proceedings, it is very much pertinent here to discuss with regard to the above two disallowances made in the assessment proceedings for ease of understanding and appreciating the real facts which leads to the initiation of penalty proceedings. During the course of assessment proceeding, the AO issued and served a show cause notice along with the draft assessment order to the assessee company on 16.3.2022 proposing to disallow the Employees contribution of Provident Fund amounting to Rs.16,61,049/- u/s 36(1)(va) of the Act as well as the Health & education cess amounting to Rs.1,22,79,936/- claimed as deduction u/s 37 of the Act. The assessee filed its written reply on 19.3.2022.

3.2 With regard to disallowance of employee's contribution to PF u/s 36(1)(va) of the Act, the assessee had mainly contended before the AO that due to the immediate finance requirement, there has been certain delays during some of the interim months, which resulted in delayed payment of Rs.16,61,049/-. Further, the assessee submitted that as per the Hon'ble Karnataka High Court in the case of Essae Teraoka (P.) Ltd. Vs. DCIT, Circle-11(3) (2014) (366 ITR 408) (Karnataka) which held that if the Amount of PF collected from the employees are paid even before the due date for filing of the income tax return as per the provisions contained u/s 43B of the Act, then no disallowance should be made. Based on this, even jurisdictional ITAT have been allowing such remittances if made before the due date for filing the return of income in their Orders. Since in the present case, the assessee has remitted all PF contribution before the due date for filing the return of income, therefore, relying on the decision of the jurisdictional High Court prayed not to disallow the same. Further, the assessee company also submitted that due to the clarification amendment in the

Finance Act,2021 by way of adding explanation-2 in the section 36(1)(va) which says 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 AO on the other hand after considering the reply of the assessee held that the assessee has not submitted any supporting documents/evidences in support his claim of financial constraints. Further, AO held that from the plain reading of section 36(1)(va) of the Act, it is very much clear that the assessee has to deposit the employee's contribution within the stipulated date of the respective Acts and if not deposited the same will be treated as deemed income of the assessee and in the light of the above discussion the delay in deposit of employee's contribution by the assessee amounting to Rs.16,61,049/- was disallowed by the AO u/s 36(1)(va) r.w.s. 2(24)(x) of the Act.

3.3 Now with regard to disallowance of health and education cess claimed as deduction amounting to Rs.1,22,79,926/-, during the course of assessment proceedings, the assessee company submitted before the AO by heavily relying on the decisions of Hon'ble Bombay High Court in the case of Cessa Goa Ltd. Vs. ACIT (ITA No.17 of 2013) (Bom. HC), Hon'ble Rajasthan High Court in the case of Chambal Fertilizers and Chemicals Ltd. Vs. JCIT (ITA No. 52 of 2018) (Raj. HC), ITAT, Pune in the case of DCIT Vs. Tata Autocomp Hendrickson in ITA Nos. 2486 to 2488/PUN/2017 dated 18/09/2019 as well as ITAT, Kolkata in the case of M/s Philips India Limited Vs. ACIT in ITA Nos. 2097 & 2418/KOL/2018 dated 22/08/2023 that since all the above decisions affirm the view that Health and Education cess is allowable as expenditure and further the word "cess" is conspicuously absent under Section 40(a)(ii) of the Act, the assessee company based on the bonafide belief that the Health & education cess are allowable expenditure, claimed the same as deduction in its return of Income.

3.4 However in view of the Finance Bill, 2022 had amended Section 40(a)(ii) of the Act to include the "cess" within the meaning of "Tax" & which will apply retrospectively from 1st April, 2005 & accordingly the claim of Health & Education cess is not allowable as a business expenditure. Therefore the assessee company before the completion of the Assessment proceedings, had filed an application dated 21.4.2022 (placed in pg-71 of the appeal bunch) before the AO voluntarily withdrawing the deduction claimed of health and education cess and offered the same for tax by enclosing the revised computation of income as the filing of the revised return U/s 139(5) was already barred by time for the Asst. year 2020-21.

3.5 The AO on the other hand although observed in the Assessment Order that in the earlier years neither any such education cess paid was claimed as deduction by the assessee nor allowed by the department, which indicates that the assessee has made the particular claim while heavily relying a particular decision in this matter.

3.6 Further, the AO was of the opinion that the SLP bearing SLP(C) No. 7379/2019 was preferred by the Revenue against the judgment of Hon'ble Rajasthan High Court in the case of Chambal Fertilizers(Supra) and the same was dismissed on the ground of low tax effect only. As the matter is yet to attain the finality in supreme court & accordingly the AO held by relying on the decision of Mumbai Tribunal in the case of Everest Industries Ltd [2018] 90 taxmann.com 330 as well as in the case of Kalimati Investment Co. Ltd in ITA No. 4508/Mum/2010 that Education cess so paid is a payment in the nature of distribution of income. It is nothing but the state's right in the profits of the Assessee, akin to income tax.

The Question of levy of Cess would arise only after profits are determined and are available for distribution. Lastly the AO held that as there are no provisions under the income tax act to make amendment in the return of income at the assessment stage without revising the return in view of the judgement of Hon'ble Supreme Court in the case of Goetz (India) Ltd. Vs. CIT (2006) (284 ITR 323), the deduction claimed amounting to Rs.1,22,79,926/- was accordingly added to the returned income.

3.7 Finally, before completing the assessment proceedings, the AO initiated the penalty proceedings u/s 270A of the Act by stipulating the following reasons in the order of assessment-

"*As the assessee had suppressed its true income by misrepresentation of facts/suppression of facts, penalty proceedings u/s 270A of the Act are initiated separately for under reporting of income in consequence of misreporting of income*."

3.8 Thereafter, the AO issued penalty notice u/s 274 r.w.s. 270A of the Act on 16.9.2022 asking the assessee to show cause as to why penalty u/s 270A of the Act should not be levied for under reporting in respect of late payment of Employees's share of PF contribution and mis-reporting of Income in respect of education cess claimed as deduction.

3.9 In the mean while the assessee had also filed an application u/s 270AA(2) of the Act in form No.68 on 06/10/2022 for granting of immunity. The opportunity of being heard was accorded to assessee on 19/10/2022 to furnish reply & the assessee also furnished reply on 21/10/2022 through E-proceedings. The AO merely by stating that on the basis of the facts of the case, it is seen that it is not a case wherein immunity u/s 270A can be granted & accordingly rejected the application for grant of immunity vide

Order dated 28/11/2022. The e-filing Acknowledgement of filing Form-68 is reproduced below for ease of reference & convenience-

Acknowledgement Receipt of Income Tax Forms

(Other Than Income Tax Return)

e-Filing Anywhere Anytime
Income Tax Department, Government of India

e-Filing Acknowledgement Number / Quarterly Statement Receipt Number	Date of e-Filing
619633880061022	06-Oct-2022

Name	:	IIFL SAMASTA FINANCE LIMITED
PAN/TAN	:	AAACC4577H
Address	:	110/3, Lalbagh Main Road, Krishnappa Layout,,Near Urvasi Theatre, Behind SBI ATM,Bangalore South,Sampangiramnagar S.O,BANGALORE,Karnataka,INDIA,560027
Form No.	:	Form 68
Form Description	:	Form of application under section 270AA(2) of the Income-tax Act, 1961
Assessment Year	:	2020-21
Financial Year	:	-
Month	:	-
Quarter	:	-
Filing Type	:	Original
Capacity	:	Managing Director
Verified By	:	AAJPV2474Q

(This is a computer generated Acknowledgement Receipt and needs no signature)

3.10 After the rejection of the application for grant of immunity vide order dated 28/11/2022, the assessee also in response to the Penalty show cause notice had made submissions on 16/12/2022 as well as on 14/03/2023 which according to AO are same explanation reproduced below for ease of reference & convenience:

GOWTHAMA & COMPANY
CHARTERED ACCOUNTANTS

GC/269/2022 December 15, 2022

The Dy. Commissioner of Income Tax
Circle 6(1)(1)
Bangalore.

Dear Sir,

Ref: PAN: AAACC4577H – IIFL Samasta Finance Ltd., No110/3, Lalbagh Main Road, Krishnappa Layout, Bangalore -560 027.

Assessment Year 2020-21

Your Notice u/s.274 r.w.s.270A of Income tax Act, 1961, dated 09.12.2022.

Your above notice requiring the assessee to show cause why an order imposing a penalty u/s.270A of Income tax Act, should not be passed for (a) disallowance of deduction u/s.36(1)(va) of Income tax Act in respect of delay in remittance of PF of Rs.16,61,049/- and (b) misreporting of income in respect of Education Cess claimed as deduction amounting to Rs.1,22,79,926/- has been forwarded to us with instructions to write to you as under:

With regard to disallowance of Employees Contribution towards PF and ESI, disallowed u/s.36(1)(va) of Income Tax Act of Rs.16,61,049/- is concerned, the claim was made based on the decision of Hon'ble High Court of Karnataka in the case of SC Teraoka Pvt.Ltd. Vs DCIT, wherein employees contribution, if paid before the due date for filing the return of income should be allowed along with deduction u/s. 43B of Income tax Act. It is only due to the amendent made in Finance Act of 2021. The employees contribution was required to be disallowed, separately as per provisions of section 36(1)(va) of Income tax Act, till the amendment of the Act, since there was an order of Jurisdictional High Court, the claim was made by the assessee. Therefore, there was no misrepresentation of fact or wrong claim made by the assessee at all. In fact, even after the amendment was carried out, Hon'ble Income Tax Appellate Tribunal, Bangalore, was allowing the claim u/s.36(1)(va) upto Asst. Year 2020-21, stating that the amendment is only perspective, not retrospective. However, now due to an order passed by the Hon'ble Supreme Court of India, the claim is not allowable at all. Therefore, kindly note that there is no misreporting or underreporting of the claim made by the assessee.

GOWTHAMA & COMPANY
CHARTERED ACCOUNTANTS

With regard to the deduction claimed in respect of the Education Cess amounting to Rs.1,22,79,926/- as expenditure is concerned, such deducton was claimed based on various orders of Hon'ble High Court of Mumbai, which was also followed by Income Tax Appellate Tribunal, Pune & Kolkota. Therefore, there is no underreporting or misreporting of income since the same is based on certain judicial pronouncements. However, in the Finance Act 2022, a clarification was made by the Hon'ble Finance Minister amending the provisions of Section 40(a)(ii) with retrospective effect from 2005, bringing the word 'Cess' within the meaning of tax. Therefore, the assessee company, before the completion of assessment, filed a letter together with revised computation of income withdrawing the claim of deduction of the Cess as expenses since as per provisions of Income tax Act, the revised return could not be filed, and intimation in the form of letter was made. But for the amendment with retrospective effect, the amount of Cess should have been allowed as deduction based on High Court order.

In view of the above, kindly note that there is no misreporting/underreporting of income was made by the assessee.

In view of the above, we request that penalty proceedings initiated u/s.270A may kindly be dropped.

Thanking you,

Yours faithfully,
For GOWTHAMA & COMPANY
CHARTERED ACCOUNTANTS

H.V. GOWTHAMA
PARTNER

3.11 Since the AO was of the opinion that immunity u/s 270AA has not been granted to the assessee as the penalty was initiated for the under-reporting of income as well as mis-reporting of Income and taking into account assessee's submission as well as by relying on various decisions of Hon'ble Apex Court as well as High Courts didn't accept the explanation offered by the assessee and levied the total penalty of Rs.84,58,184/- for the Asst. year 2020-21 as detailed given below for ease of reference and convenience-

Under reporting	**Rs.**
Addition made on which penalty u/s 270A attracts	16,61,049/-
Tax thereon	4,98,315/-
Add: Cess 4%	19,933/-
Total tax on addition	**5,18,248/-**
Penalty U/s. 270A(7) i.e., 50% of the tax payable	**2,59,124/-**

Misreporting	**Rs.**
Addition made on which penalty u/s 270A attracts	1,22,79,926/-
Tax thereon	3683978
Surcharge	257878
Add: Cess 4%	157674
Total tax on addition	**Rs.4099530/-**
Penalty U/s. 270A(8) i.e., 200% of the tax payable	**Rs.81,99,060/-**

Total Penalty amounting to **Rs.84,58,184/-** [Rupees Eighty Four lakhs Fifty Eight thousand One hundred and Eighty Four only] is hereby levied.

3.12 Aggrieved by the penalty order passed u/s 270A of the Act dated 28.3.2023, the assessee had preferred an appeal before the ld. CIT(A)/NFAC.

3.13 Ld. CIT(A)/NFAC on the other hand, dismissed the appeal of the assessee with the following observations:-

DECISION OF THE APPELLATE AUTHORITY W.R.T GROUND NO.- 1 TO 7:

The contentions of the Assessing Officer and the Appellant Assessee have been carefully considered. It is seen that, though the grounds are seven in number and the eight is general in nature. However, all the said seven grounds are with reference to two additions. Hence, considering them together this Appellate authority has noted the following points:

i. The AO /NeFAC completed the assessment u/s 143(3) r.w.s 144B of the Income-tax Act for the A.Y. 2020-21 on 16/9/2022 assessing the income at Rs. 128,25,28,401/- by making following addition:

1. Disallowed the employees PF contribution u/s 36(1)(va): Rs. 16,61,049

2. Disallowed deduction of Education cess: Rs.1,22,79,936

ii. The Appellant Assessee filed an application u/s. 270AA(2) of the Act, for granting of immunity on 06.10.2022 in Form no.-68. An opportunity of being heard was accorded to the assessee on 19.10.2022 to furnish reply.

The appellant assessee filed its reply dated 21.10.2022 via the e-proceedings, but it is pertinent to mention here that the **appellant assessee filed an unsigned FORM No.-68**. The AO gave one more opportunity to the appellant assessee to be heard in the favor of natural justice and then rejected the Immunity application of the Appellant Assessee accordingly.

ADDITION NO.- I: Disallowance of Employees contribution towards PF and ESI :

i. The Appellant Assessee has contented in its submissions that, *"The Appellant Company is liable to pay Provident Fund as per provisions of PF Act. As per the PF Act, portion of PF is collected from employees as contribution and deposited to PF Commissioner. As per section 36(1)(va), said PF collected from employees is required to be deposited before the due date as per the said Act. However, Jurisdictional High Court had held in the case of Essae Teraoka Pvt.Ltd. Vs DCIT that, if payment of PF collected from employees are paid before the due date for filing the Income tax returns, no disallowance should be made for violation of section 36(1)(va). Based on this, even Jurisdictional ITAT has been allowing such remittances made before the due date for filing the return of income in their order. The Central Government amended the provisions of the section and clarified that any such delay in payment of employee's contribution shall not be allowed as deduction, if the same is paid beyond the due date of remittance as per the provisions of PF and ESI Act. This amendment is made subsequent to filing of the return of Income by the appellant and till the date of acknowledgement the Jurisdictional High Court order was being followed in the state of Karnataka. Honourable Income Tax Appellate Tribunal has held in various cases that the amendment is only prospective and therefore the same shall not be applicable in respect of earlier to Asst. Year 2021-22. The Honourable Supreme Court in the case of Checkmate Facility and Electronic Solutions*

Pvt. Ltd. Vs DCIT passed an order on 12.10.2022 has held that even in respect of earlier Asst. Year, the amount should have been paid before the due date as specified under the PF Act. Till this order of the Honourable Apex Court, the Ld. Assessing Officer should have followed the Jurisdictional High Court Order and based on such order, there is no default committed by the Appellant for the year under consideration and hence levy of penalty Under Section 270A(7) of Rs.2,59,124 is not justifiable."

ii. In the above submissions the appellant assessee company has itself submitted that, the Central Government has made the amendment in the provisions and clarified that any delay in the payment of employee contribution shall not be allowed as deduction is same is paid beyond the due date of remittance as per the provisions of PF Act. The appellant assessee company has itself submitted that, the **Hon'able Supreme court in the case of *Checkmate Facility and Electronic Solutions Pvt. Ltd. Vs DCIT passed vide an order dt. 12.10.2022*** *has held that "....even in respect of earlier Asst. Year, the amount should have been paid before the due date as specified under the PF Act."*

iii. But appellant assessee company has contended that the deduction should be allowed for late payment of employee PF contribution for returns filled before this judgment date i.e. 12.10.2022.

iv. But in the opinion of this appellate authority this contention of the appellant assessee company is baseless and not tenable in the light of the **Hon. Supreme Court judgment in case of *Checkmate Facility and Electronic Solutions Pvt. Ltd. Vs DCIT passed vide an order dt. 12.10.2022* that, even in respect of earlier Asst. Year, the amount should have been paid before the due date as specified under the PF Act.**

v. The appellant assessee has also not stated that, if appellant had filed an appeal against the original assessment order in the CIT(A), then it is at what stage of proceedings before the CIT(A)'s concerned. The Appellant Assessee is silent on the issue whether the appeal has been decided in favour of the department or in favour of the appellant assesse. Further, it is not clear whether the appellant has filed an appeal against the quantum / original Assessment order or not.

vi. The Assessing officer in its Penalty Order has stated that Appellant Assessee has not paid the employees contributions towards PF and ESI before the due date mentioned in the respective statue. The Assessing Officer has placed reliance on the Judgment of the **Hon'ble Supreme Court in case of Checkmate Services Pvt Ltd vs DCIT** in which the Court has stated that, **the employees contributions towards PF and ESI are deductible only if they are paid before the due date, but in the case of the appellant assessee, it has been paid after the due date.**

vii. It is very much evident that the explanation/submission offered by the Appellant Assessee are not acceptable as the appellant assessee has not provided any proof/documentary evidences in support of its claim, it means that the appellant assessee has under reported his income by not providing the relevant proofs/documents.

viii. It is noted, that the AO has made addition of Rs. Rs.16,61,049/-, u/s. 36(1)(va) of the Act and found the assessed income is greater than income processed under section 143(1).Tax payable on Rs. Rs.16,61,049/- is Rs. 5,18,248/- (30% of Rs Rs.16,61,049/- including Ed. Cess,). Therefore, 50% penalty on tax payable on account of under

reporting of income is Rs 2,59,124/- (50% of Rs.5,18,248/-). Thus, Penalty of Rs. 2,59,124/- was levied on the Appellant for the AY 2020-21 for under reporting of income.

Hence, in view of the above facts and discussions at point no.- (i) to (vii) above, this Appellate authority is in the view that, the penalty levied by the AO is correct and this Appellate authority thus uphold's the Penalty levied by the Ld. AO at Rs. 2,59,124/- (being 50% of Rs. 5,18,248/-).

ADDITION NO.- II : Disallowance of Education cess:

i. The appellant assessee in its submissions has stated that, *"The Appellant Company for the year under consideration, had paid Education Cess of Rs.1,22,79,936. In the return of income filed for Asst. Year 2020-21, the Appellant claimed the Education Cess as expenses relying on the decision of Mumbai High Court in the case of Sesa Goa Limited Vs. JCIT, which further was followed by Honourable Rajasthan High Court in the case of Chambal Fertilizers and Chemicals Ltd. Vs JCIT. There was no clarity in Section 40(a)(ii) relating to Cess being included as part of Income tax.* ***The Finance Act 2022 introduced an amendment inserting an explanation with retrospective effect from 2005 onwards, bringing the word Cess also within the frame work of tax.*** *At the time of making the claim while filing the return of Income, the amendment was not there and the claim was made based on then prevailing Honarable High Court decision. The claim was made purely based on the decision of Honourable High Court and there is no misreporting as specified by the Ld. Assessing Officer in the order of levy of penalty under Section 270A. The Ld. Assessing Officer has specified in page-16 of the order that the word tax as defined in section 2(43) is subject to unless the context otherwise requires, in that view of the mater, the words any tax in section 40(a) (ii) includes Cess. Thus it is a settled position that Cess being in tax, is not an allowable deduction u/s. 40(a)(ii) of the I.T. Act. This amendment to the section has been made only after amendment made during Finance Act 2022. The word cess was not there earlier in the section 40(a)(ii)."*

ii. It is pretty clear that, **the GOI vide a Finance Act 2022 introduced an amendment inserting an explanation with retrospective effect from 2005 onwards, bringing the word Cess also within the frame work of tax.** Thus, the claim of the Appellant is incorrect and should have been withdrawn.

iii. The Appellant Assessee has not provided any documentary evidences with its submissions in support of its claim. This Appellate Authority without the documentary evidences is deciding this appeal of the appellant assessee on the material available on record as many opportunities have been provided to the appellant assessee.

iv. The appellant assessee has also not stated whether the appellant had filed an appeal against the quantum/ original assessment order before the CIT(A) concerned and if yes, then at what stage are the proceedings before the CIT(A)'s. The Appellant Assessee is silent on the issue whether the said appeal has been decided in favour of the department or in favour of the appellant assesse. Further, it is not clear whether the appellant has filed an appeal against the quantum / original Assessment order or not.

v. The case laws on which reliance has been placed by the Ld. AO in its Assessment Order are mentioned hereunder:

a. KP Madhusudhanan Vs CIT

b. CIT vs KP Madhusudhanan

c. Sir Shadilal's Case 1987 168 ITR 705

d. CIT vs K. Srinivasan

vi. All these cases laws / judgements have been considered carefully and this Appellate authority is in the view that the case laws mentioned by the Assessing Officer in its Penalty Order are found to be correct and has relevance with the case findings in case of the appellant assessee.

vii. Thus, it is seen that, the AO has made an addition of Rs. 1,22,79,926/- in its order on account of disallowance of deduction of Health and Education Cess claimed by the assesse. The AO found that, the assessed income is greater than income processed under section 143(1) and the tax payable on Rs. 1,22,79,926/- is Rs. 40,99,530/- (30% of Rs. 1,22,79,926/- and Education cess and Surcharge). Further, that 200% penalty on tax payable on account of under reporting of income which is in consequence of misreporting is Rs 81,99,060/- (200% of Rs. 40,99,530/). Thus, Penalty of Rs 81,99,060/- was levied by the AO on the appellant for this AY 2020-21 for under reporting of income in consequence of misreporting.

In view of the above facts and discussion, it is evident that the explanation/submissions offered by the appellant assessee are falling short and thus not acceptable. Further, the appellant assessee has not provided any documentary evidences/ proofs in support of its claims before this Appellate authority and as also the position of law brought out by the Ld. AO in its Penalty order are having a direct relevance with the case facts of the appellant assessee. **Thus, this Appellate authority is satisfied and therefore, uphold's the Penalty of Rs 81,99,060/- (being 200% of Rs. 40,99,530/) was levied by the Ld AO u/s. 270A of the Act, and thus the grounds of appeal of the appellant are rejected.**

Thus, to sum up the grounds of appeal no.-1 to 7 of appellant are decided against the appellant and the ground no.-8 being general is dismissed.

- **In the result, this appeal of the assessee is NOT ALLOWED.**

3.14 Aggrieved by the order of the CIT(A)/NFAC dated 04.04.2024, the assessee has filed the present appeal before the Tribunal.

3.15 Before us, the ld. AR of the assessee reiterated the same grounds as placed before the lower authorities and submitted that based on the judgments of certain Jurisdictional as well as Non jurisdictional High Courts and the Tribunal which were in favour of the assessee, the same were claimed as expenditure in the original return of income based on a honest & bonafide belief that it is an allowable expenditure. Subsequently, due to the amendment carried out by the Finance Act with retrospective effect which was not at all anticipated by the assessee company at the time of filing the return, the assessee company during the course of the

assessment proceedings had filed the letter of withdrawal of claim of Health & Education cess along with the revised computation since the filing of the revised return was barred by time. The AR of the assessee also vehemently submitted that as the claims of expenditure were bonafide based on the honest belief since there were judicial pronouncements in favour of the assessee company, the penalty levied is liable to be deleted. Lastly the AR of the assessee submitted that the penalty should not be levied in a routine or casual manner since the assessee has neither under reported nor mis-reported any income & the conduct of the assessee company is fair.

4. The ld. D.R. on the other hand, supported the orders of the authorities below.

5. We have heard the rival submissions and perused the materials available on record. The AO has passed an order u/s 143(3) r.w.s. 144B of the Act on 16.9.2022 with a total income of Rs.128,25,28,401/- by making two disallowances in the assessment order viz. (a) disallowance of employee's share of provident contribution u/s 36(1)(va) of the Act amounting to Rs.16,61,049/- and (b) disallowance of education cess claimed as deduction u/s 37 of the Act amounting to Rs.1,22,79,936/-. It is an undisputed fact that the Return of Income for the Asst. year under consideration was filed on 13.02.2021 and at the time of filing the Return, there were judgments of certain Jurisdictional as well as Non jurisdictional High Courts and the Tribunals cited supra in favour of the assessee and accordingly the assessee company claimed the same as expenditure in the original return of income based on an honest & bonafide belief that these are allowable expenditure. The assessee company not only contended the same before the AO but also before the ld. CIT(A). The Authorities below have also not disapproved that the judgments relied upon by the assessee company are incorrect. We are of the opinion that

everything would depend upon the Return of Income filed because that is the only document where the assessee company can under report its Income or mis-report its Income**.** When such Income are found to be under reported in the return of Income or misreported in the return, then only the liability would arise. It is also an undisputed facts that with regard to employee's contribution towards PF, the assessee contended before the authorities below that the claim was made in the return of income based on the decision of Hon'ble Jurisdictional High Court of Karnataka in the case of Essae Teroka Pvt. Ltd. Vs. DCIT cited (supra), wherein the employees contribution if paid before the due date of filing the return of income held to be allowed as per provisions contained in section 43B of the Act. It is only due to the clarification amendment in the Finance Act, 2021 which came after filing the Return of Income for the Asst. year 2020-21 by adding explanation-2 in the section 36(1)(va) which says 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 and as such the AO started disallowing the employee's contribution to PF retrospectively. At the time of filing the return of Income only an order of the jurisdictional High Court in favour of the assessee company was there which was binding judicial precedent and based on that the assessee on a honest and bonafide belief claimed the same as deduction. Further the Hon'ble Apex court decision in the case of Checkmate Services Pvt. Ltd Vs. CIT as reported in civil Appeal No. 2833 of 2016 which ultimately settled the issue in favour of the revenue came only on 12/10/2022 i.e. way after filing the return of Income and till this order of the Hon'ble Apex Court, the ld. AO should have followed the jurisdictional High Court's order. As submitted by the AR of the Assessee company that the disallowance under the employee' share to PF was also not contested before the higher Authorities and the assessee company

accepted the Assessment Order as well. Therefore, we are of opinion that the assessee's contention before the authorities below that there was neither under reporting of Income nor mis reporting of Income seems to be correct. Now with regard to the deduction claimed in respect of Health & education cess amounting to Rs.1,22,79,926/-, the assessee contended that such deduction was claimed based on decision of the Hon'ble High Court of Mumbai as well as Hon'ble Rajasthan High Court noted (supra), which were also followed by Income Tax Tribunal, Pune and Kolkata. Since the deduction of Health & education cess was claimed on an honest & bonafide belief based on certain judicial pronouncements in favour of the assessee, there is no question of under reporting or misreporting of income. Further, the assessee contention that the Finance Act, 2022 with retrospective effect from 2005 brought the word "cess" within the meaning of tax which was not there at the time of filing the return for the Asst. year 2020-21. Therefore, the assessee company before the completion of assessment also filed a letter together with the revised computation of income withdrawing the claim of deduction of the Health & education cess as expenses since the filing of revised return was barred by time, which fact has been duly noted and accepted in the Asessment Order. Therefore we also find merits in this contention of the assessee too.

5.1 We also cannot brush aside the fact that assessee company had also filed Form No. 68 on 6.10.2022 as per the provision contained u/s 270AA(2) of the Act requesting for grant of immunity. The AO merely by stating that on the basis of the facts of the case, it is seen that it is not a case wherein immunity u/s 270A can be granted & accordingly rejected the application for grant of immunity vide Order dated 28/11/2022. The AO has levied penalty u/s 270A of the Act both under the provisions of sub-section (7) of section 270A of the Act as well as sub-section (8) of section 270A of the Act totaling Rs.84,58,184/-. The penalty under sub-section (7) of

section 270A of the Act was levied for disallowance of employees contribution u/s 36(1)(va) of the Act treating as under reported under sub section (2) of Section 270A of the Act whereas disallowance of deduction of Health & education cess u/s 37 of the Act was considered under reported is in consequence of misreporting of income under section 270A(2) rws 270(9) of the Act.

5.2 For the purpose of evaluating the correctness of rival submissions addressed we deem it apposite to extract section 270A & 270AA of the Act herein below:

270A. Penalty for under-reporting and misreporting of income.

(1)The Assessing Officer or the Commissioner (Appeals) or the Principal Commissioner or Commissioner may, during the course of any proceedings under this Act, direct that any person who has under-reported his income shall be liable to pay a penalty in addition to tax, if any, on the under-reported income.

(2)A person shall be considered to have under-reported his income, if—

(a)the income assessed is greater than the income determined in the return processed under clause (a) of sub-section (1) of section 143;

(b)the income assessed is greater than the maximum amount not chargeable to tax, where no return of income has been furnished or where return has been furnished for the first time under section 148;

(c)the income reassessed is greater than the income assessed or reassessed immediately before such reassessment;

(d)the amount of deemed total income assessed or reassessed as per the provisions of section 115JB or section 115JC, as the case may be, is greater than the deemed total income determined in the return processed under clause (a) of sub-section (1) of section 143;
(e)the amount of deemed total income assessed as per the provisions of section 115JB or section 115JC is greater than the maximum amount not chargeable to tax, where no return of income has been furnished or where return has been furnished for the first time under section 148;

(f)the amount of deemed total income reassessed as per the provisions of section 115JB or section 115JC, as the case may be, is greater than the deemed total income assessed or reassessed immediately before such reassessment;

(g)the income assessed or reassessed has the effect of reducing the loss or converting such loss into income.

(3)The amount of under-reported income shall be,—

(i)in a case where income has been assessed for the first time,—

(a)if return has been furnished, the difference between the amount of income assessed and the amount of income determined under clause (a) of sub-section (1) of section 143;

(b)in a case where no return of income has been furnished or where return has been furnished for the first time under section 148,—

(A)the amount of income assessed, in the case of a company, firm or local authority; and

(B)the difference between the amount of income assessed and the maximum amount not chargeable to tax, in a case not covered in item (A);

(ii)in any other case, the difference between the amount of income reassessed or recomputed and the amount of income assessed, reassessed or recomputed in a preceding order:

***Provided** that where under-reported income arises out of determination of deemed total income in accordance with the provisions of section 115JB or section 115JC, the amount of total under-reported income shall be determined in accordance with the following formula—*
(A — B) + (C — D)
where,
A = the total income assessed as per the provisions other than the provisions contained in section 115JB or section 115JC (herein called general provisions);
B = the total income that would have been chargeable had the total income assessed as per the general provisions been reduced by the amount of under-reported income;
C = the total income assessed as per the provisions contained in section 115JB or section 115JC;
D = the total income that would have been chargeable had the total income assessed as per the provisions contained in section 115JB or section 115JC been reduced by the amount of under-reported income:
***Provided further** that where the amount of under-reported income on any issue is considered both under the provisions contained in section 115JB or section 115JC and under general provisions, such amount shall not be reduced from total income assessed while determining the amount under item D.*

Explanation.—For the purposes of this section,—

(a)"preceding order" means an order immediately preceding the order during the course of which the penalty under sub-section (1) has been initiated;

(b)in a case where an assessment or reassessment has the effect of reducing the loss declared in the return or converting that loss into income, the amount of under-reported income shall be the difference between the loss claimed and the income or loss, as the case may be, assessed or reassessed.

(4)Subject to the provisions of sub-section (6), where the source of any receipt, deposit or investment in any assessment year is claimed to be an amount added to income or deducted while computing loss, as the case may be, in the assessment of such person in any year prior to the assessment year in which such receipt, deposit or investment appears (hereinafter referred to as "preceding year") and no penalty was levied for such preceding year, then, the under-reported income shall include such amount as is sufficient to cover such receipt, deposit or investment.

(5)The amount referred to in sub-section (4) shall be deemed to be amount of income under-reported for the preceding year in the following order—

(a)the preceding year immediately before the year in which the receipt, deposit or investment appears, being the first preceding year; and

(b)where the amount added or deducted in the first preceding year is not sufficient to cover the receipt, deposit or investment, the year immediately preceding the first preceding year and so on.

(6)The under-reported income, for the purposes of this section, shall not include the following, namely:—

(a)the amount of income in respect of which the assessee offers an explanation and the Assessing Officer or the Commissioner (Appeals) or the Commissioner or the Principal Commissioner, as the case may be, is satisfied that the explanation is bona fide and the assessee has disclosed all the material facts to substantiate the explanation offered;

(b)the amount of under-reported income determined on the basis of an estimate, if the accounts are correct and complete to the satisfaction of the Assessing Officer or the Commissioner (Appeals) or the Commissioner or the Principal Commissioner, as the case may be, but the method employed is such that the income cannot properly be deduced therefrom;

(c)the amount of under-reported income determined on the basis of an estimate, if the assessee has, on his own, estimated a lower amount of addition or disallowance on the same issue, has included such amount in the computation of his income and has disclosed all the facts material to the addition or disallowance;

(d)the amount of under-reported income represented by any addition made in conformity with the arm's length price determined by the Transfer Pricing Officer, where the assessee had maintained information and documents as prescribed under section 92D, declared the international transaction under Chapter X, and, disclosed all the material facts relating to the transaction; and

(e)the amount of undisclosed income referred to in section 271AAB.

(7)The penalty referred to in sub-section (1) shall be a sum equal to fifty per cent of the amount of tax payable on under-reported income.

(8)Notwithstanding anything contained in sub-section (6) or sub-section (7), where under-reported income is in consequence of any misreporting thereof by any person, the penalty referred to in sub-section (1) shall be equal to two hundred per cent of the amount of tax payable on under-reported income.

(9)The cases of misreporting of income referred to in sub-section (8) shall be the following, namely:—

(a)misrepresentation or suppression of facts;
(b)failure to record investments in the books of account;
(c)claim of expenditure not substantiated by any evidence;
(d)recording of any false entry in the books of account;
(e)failure to record any receipt in books of account having a bearing on total income; and
(f)failure to report any international transaction or any transaction deemed to be an international transaction or any specified domestic transaction, to which the provisions of Chapter X apply.

(10)The tax payable in respect of the under-reported income shall be—

(a)where no return of income has been furnished or where return has been furnished for the first time under section 148 and the income has been assessed for the first time, the amount of tax calculated on the under-reported income as increased by the maximum amount not chargeable to tax as if it were the total income;

(b)where the total income determined under clause (a) of sub-section (1) of section 143 or assessed, reassessed or recomputed in a preceding order is a loss, the amount of tax calculated on the under-reported income as if it were the total income;

(c)in any other case, determined in accordance with the formula—(XY)
where,

X = the amount of tax calculated on the under-reported income as increased by the total income determined under clause (a) of sub-section (1) of section 143 or total income assessed, reassessed or recomputed in a preceding order as if it were the total income; and

Y = the amount of tax calculated on the total income determined under clause (a) of sub-section (1) of section 143 or total income assessed, reassessed or recomputed in a preceding order.

(11)No addition or disallowance of an amount shall form the basis for imposition of penalty, if such addition or disallowance has formed the basis of imposition of penalty in the case of the person for the same or any other assessment year.

(12)The penalty referred to in sub-section (1) shall be imposed, by an order in writing, by the Assessing Officer, the Commissioner (Appeals), the Commissioner or the Principal Commissioner, as the case may be.

"270AA. Immunity from imposition of penalty, etc.—
(1) An assessee may make an application to the Assessing Officer to grant immunity from imposition of penalty under section 270A and initiation of proceedings under section 276C of section 276CC, if he fulfils the following conditions, namely:—

(a) the tax and interest payable as per the order of assessment or reassessment under sub-section (3) of section 143 or section 147, as the case may be, has been paid within the period specified in such notice of demand; and
(b) no appeal against the order referred to in clause (a) has been filed.

(2) An application referred to in sub-section (1) shall be made within one month from the end of the month in which the order referred to in clause (a) of sub-section (1) has been received and shall be made in such form and verified in such manner as may be prescribed.

(3) The Assessing Officer shall, subject to fulfilment of the conditions specified in sub-section (1) and after the expiry of the period of filing the appeal as specified in clause (b) of sub-section (2) of section 249, grant immunity from imposition of penalty under section 270A and initiation of proceedings under section 276C or section 286CC, where the proceedings for penalty under section 270A has not been initiated under the circumstances referred to in sub-section (9) of the said section 270A.

(4) The Assessing Officer shall, within a period of one month from the end of the month in which the application under sub-section (1) is received, pass an order accepting or rejecting such application:

***Provided** that no order rejecting the application shall be passed unless the assessee has been given an opportunity of being heard.*

(5) The order made under sub-section (4) shall be final.

(6) No appeal under section 246A or an application for revision under section 264 shall be admissible against the order of assessment or reassessment, referred to in clause (a) of sub-section (1), in a case where an order under sub-section (4) has been made accepting the application.".

5.3 Before leaping to section 270A of the Act, we first consider section 270AA of the Act in order to find out whether the Form 68 filed by the Assessee Company on 06/10/2022 was valid. On plain reading of section 270AA of the Act, we are of the opinion that statutory scheme for grant of immunity is based on the satisfaction of the five conditions namely,

1. The tax and interest demand payable has been paid within the period specified in the notice of demand.
2. The Order of assessment or Reassesment must be passed u/s 143(3) and/or u/s 147 of the Act.
3. No appeal against the aforesaid order has been filed by the assessee.
4. Application in form 68 shall be made within one month from the end of the month in which the order has been received.
5. The proceedings for the penalty has not been initiated under the circumstances referred in section 270A(9) of the Act.

5.4 In the present case, no tax and interest demand payable is required to be paid as per the notice of demand issued u/s 156 of the Act. The assessment order is passed u/s 143(3) r.ws. 144B of the Act on 16.9.2022. Further, as stated by the ld. A.R. of the assessee, no appeal has been filed against assessment order dated 16.9.2022 and the assessee filed an application in form 68 (placed in page 53 of the appeal paper book) on 6.10.2022 i.e. within one month from the end of month in which the Assessment order has been received and the penalty for disallowance of employees contribution to EPF amounting to Rs.16,61,049/- is levied for under reporting of income as per the provisions contained in section 270A(2)(a) of the Act. Therefore, even if we assume that the penalty levied for disallowance of deduction of Health & Education cess to be under reported in consequence of misreporting then also

the penalty levied in respect of disallowance of employee's contribution to PF on account of "underreporting" of income is squarely covered under the provisions contained in section 270AA of the Act as the assessee company has satisfied all the aforesaid conditions.

5.5 By respectfully following the judgment of Hon'ble High court of Delhi in the case of Ultimate Infratech (P) Ltd. V. National faceless Assessment Centre Delhi & Anr (2022) 326 CTR 547, we are of the considered view that the assessee company acquired a right to be granted immunity u/s 270A of the Act. This is evident from the following observations as rendered therein:-

*"**5**. Having heard learned counsel for the petitioner, this Court is of the view that it is only in cases where proceedings for levy of penalty have been initiated on account of alleged misreporting of income that an assessee is prohibited from applying and availing the benefit of immunity from penalty and prosecution under s. 270AA.*

***6**. In fact, the statutory scheme for grant of immunity is based on satisfaction of three fundamental conditions, namely, (i) payment of tax demand; (ii) non-institution of appeal; and (iii) initiation of penalty on account of underreporting of income and not on account of misreporting of income.*

***7**. This Court is also of the view that the petitioner cannot be prejudiced by the inaction of the AO in passing an order under s. 270AA of the Act within the statutory time limit as it is settled law that no prejudice can be caused to any assessee on account of delay/default on the part of the Revenue.*

***8**. In the present case, the petitioner has satisfied the aforesaid conditions, in as much as, (i) the tax has been paid on the additions; (ii) appeal has undisputedly not been filed; and (iii) penalty (as would be evident from the penalty notice) has been initiated on account of "underreporting" of income.*

***9**. Consequently, this Court is of the view that the petitioner acquired a right to be granted immunity under s. 270AA of the Act. In fact, this Court, in Schneider Electric South East Asia (HQ) Pte Ltd. vs. Asstt. CIT (International Taxation) & Ors. Writ Petn. No. 5111 of 2022, has held, "This Court is further of the view that the impugned action of respondent No. 1 is contrary to the avowed legislative intent of s. 270AA of the Act to encourage/incentivize a taxpayer to (i) fast-track settlement of issue, (ii) recover tax demand; and (iii) reduce protracted litigation."*

***10**. Consequently, the impugned order under s. 270A of the Act is set aside and the respondents are directed to grant immunity under s. 270AA of the Act to the petitioner. With the aforesaid directions, the present writ petition along with pending applications stands disposed of."*

5.6 Further in the present case as we read the order of assessment, the AO initiated the penalty proceeding u/s 270A for under reporting of income in consequence of misreporting of income

on the alleged ground that the assessee company suppressed its true income by misrepresentation of facts/suppression of facts whereas the AO while passing the penalty Order had observed that notice u/s 274 r.w.s 270A of the Act was issued on 16/09/2022 asking the assessee to show cause why a penalty should not be levied on the above two additions for under reporting in respect of late payment of PF contribution received from the employees and misreporting in respect of education cess claimed as deduction. In other words the AO himself was not clear as to which limb penalty proceedings was sought to be levied.

5.7 Now coming to section 270A of the Act, on plain reading of the same, we are of the opinion that when a notice u/s 270A of the Act is issued the following stepladder should to be followed by the AO while levying penalty u/s 270A of the Act-

1. Underreporting – First the onus is on the AO to establish whether any of the contingency spoken of in clauses (a) to (g) of Section 270A(2) in the case of the assessee are attracted or not. If Yes, under which clause (limb) the assessee has underreported the income?

2. Now the onus shifted on the assessee to refute by establishing that the assessee falls within any of the clauses (a) to (e) of section 270A(6) of the Act & hence there is no underreporting of income & the proceedings end there. Section 270A(6) is a window given by the legislature to give a leave to the Assessee.

3. If the assessee is not able to controvert the charge of under reporting, the under reporting gets confirmed.

4. Once the charge of underreporting is confirmed, then the AO has to establish whether the underreporting is in consequence of any of the clauses (a) to (f) of Section 270A(9) of misreporting. If Yes, under which clause (limb) the assessee has misreported the income?

5.8 Therefore, we are of the considered opinion that without the charge of under reporting of income, the AO cannot jump directly with the charge of misreporting of income. In the present case although the AO specifically mentioned the exact limb of underreporting as per section 270A(2)(a) of the Act as the income assessed is greater than the income determined in the return processed u/s 143(1)(a) but there is not even a whisper as to how the ingredient of sub section (9) of section 270A is satisfied.

5.9 By respectfully following the judgment of Hon'ble High court of Delhi in the case of Schneider Electric South East Asia (HQ) PTE Ltd. V. Commissioner of Income Tax (International Taxation) & Ors. (2022) 443 ITR 186, we are of the considered view that failure on the part of the AO to show cause which of the specific action of the assessee company from clause (a) to (f) of Section 270A(9) was determinant before imposing penalty u/s 270A of the Act has rendered the proceedings invalid and thus untenable in the eyes of law.

5.10 Therefore, it goes without saying that for the applicability of section 270A of the Act, the conditions stated therein must be strictly followed. A mere making of the claim which is based on a honest and bonafide belief and even offered for taxation before the completion of assessment by itself will not amount to under reporting resulting in misreporting of income.

5.11 In the present case, the assessee company well before the completion of the assessment proceedings i.e. on 16.9.2022 filed a letter to AO for voluntary declaration of health and education cess by enclosing the revised computation. Considering the totality of the case, we are of the opinion that provisions of section 270A(6)(a) of the Act is squarely applicable in case of assessee company. Here, the assessee offered an explanation before the AO and we are of the opinion that the explanation is also bonafide. Since the assessee company claimed the deduction based on decision of Hon'ble jurisdictional & Non Jurisdictional High Court as well as Tribunals, and the assessee had disclosed all the material facts to substantiate the explanation. Further, the authorities below have also not controverted the decision relied on by the assessee to be incorrect. After the amendment in the Finance Act, assessee had also voluntarily disclosed the health and education cess before the AO well before the completion of assessment proceedings.

5.12 We are of the opinion that the penalty by hereditary nature is always discretionary. The legislature has used the word "may" in section 270A(1) of the Act which clearly says that it is discretionary on the part of the AO to levy penalty or not. We are also of the opinion that penalty is not at par with the tax and interest and therefore, penalty should not be levied in a light hearted manner or in routine manner and not every additions/disallowances are liable for penalty. The primary onus is on the revenue to prove that assessee falls under particular limb of default. The AO have to bring the case in the four corners of the sections in order to levy penalty which in our opinion, the authorities below failed to do so. The authority below misdirected themself by citing various irrelevant decisions of Hon'ble Supreme Court without understanding the real issues involved in the case of assessee company. Therefore, we are of the opinion that the explanation

offered by the assessee is bonafide and the assessee has disclosed all material facts to substantiate the explanation. With the above observations, we delete the penalty levied u/s 270A of the Act and allow the appeal of the assessee.

6. In the result, the appeal filed by the assessee is allowed.

Order pronounced in the open court on 27th Sept, 2024

Sd/-	**Sd/-**
(Waseem Ahmed)	**(Keshav Dubey)**
Accountant Member	**Judicial Member**

Bangalore,
Dated 27th Sept, 2024.
VG/SPS

Copy to:

1. The Applicant
2. The Respondent
3. The CIT
4. The DR, ITAT, Bangalore.
5 Guard file

By order

Asst. Registrar,
ITAT, Bangalore.