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

Before Shri Chandra Poojari, AM & Smt. Beena Pillai, JM

ITA No. 680/Bang/2020
(Assessment Year: 2014-15)

Boraiah Shivananjaiah, K. Janatha Colony, Bidadi Hobli, Ramnagara Dist., Bengaluru	Vs.	Asst.Commissioner of Income Tax, Circle - 3(2)(1) Bengaluru

PAN – ANAPS2762E

Appellant **Respondent**

Assessee by : Sri Sreehari Kutsa, Advocate
Revenue by : Sri Priyadarshini Mishra, Addl. CIT

Date of Hearing : 31-03-2022
Date of Pronouncement : 11-04-2022

O R D E R

PER CHANDRA POOJARI, A.M. :

This appeal filed by the assessee is directed against the *ex-parte* order of the CIT(A)-3, Bengaluru dated 22-01-2018 for AY 2014-15. The assessee has raised the following ground of appeal:

"1. The order of the learned Commissioner of Income-tax (Appeals), passed under section 250 of the Act in so far as it is against the Appellant is opposed to law, equity, weight of evidence, probabilities and the facts and circumstances in the appellant's case.

2. The learned CIT(Appeals), is not justified in passing the appellate order without giving adequate opportunity of hearing on the facts and circumstances of the case.

3. The learned CIT(Appeals), ought to have held that the addition of Rs.11,23,548/- in respect of employees contribution to EPF beyond due date by invoking Section 36(1)(va) of the Act is unsustainable in view of the binding precedents from jurisdictional Tribunal and High Court on the facts and circumstances of the case.

4. The learned CIT(Appeals), ought to have held that the addition of Rs.46,24,823/- in respect of the Service Tax collected and remitted does not constitute income and addition is unsustainable in law on the facts and circumstances of the case.

5. Without prejudice to the right to prefer application before the CCIT or DGIT for waiver of interest, the levy of said interest u/s.234A and 234B of the Act is unsustainable in law and on the facts and circumstances of the case.

6. The appellant craves leave to add, alter, delete or substitute any of the grounds urged above".

2. The facts of the case are that, AO framed the assessment in this case u/s.143(3) of the Income Tax Act (Act) on 23-12-2016. While framing the assessment, the AO made addition on account of non-payment of employees' contribution to ESI/PF beyond the due date. Accordingly, he invoked the provisions of Section 36(1)(va) of the Act on the reason that it was paid beyond due date prescribed in relevant Act. On this count, he made an addition of Rs.11,23,548/-. Further, he made addition for non-payment of service tax within due date and invoked provisions of Section 43B at Rs.46,24,823/-. The assessee carried the appeal before the CIT(A). The CIT(A), after giving various notices, passed *ex-parte* order by deleting the addition made towards ESI/PF at Rs.11,23,548/-. However, he sustained the addition made towards non-payment of service tax at Rs.46,24,823/- by invoking provisions of Section 43A of the Act. Against the same, the assessee is in appeal before.

3. At the outset, it is noticed that there was delay of 951 days in filing of appeal before this Tribunal. The Ld.AR submitted that assessee has not well educated and passed only 10th class and entrusted work of filing of appeal to an auditor, who in turn given the work to one Mr.Satyanarayana, who failed to appear before the CIT(A) on various occasions that the assessee was not aware of the proceedings before the CIT(A). Either the auditor not taken up the issue before the CIT(A) or communicate the order of the CIT(A) to the assessee. The assessee further submitted that the assessee came to know about the passing of order by CIT(A) when the assessee went to the new consultant for filing the return of income, he noticed the pendency of outstanding demand in income tax login portal. He sought advice from the present counsel, who advised for filing the present appeal before this Tribunal, which caused delay of 951 days. Out of this, 678 days is upto the

date of pre Covid-19 Pandemic and balance 273 days days were due to post Covid-19 Pandemic. He requested that the delay may be condoned in the interest of justice, otherwise it cause un-bearable hardship to the assessee. For this, he relied on the following judgements:

i. Collector, Land Acquisition Vs. MST. Katiji and Others (1987) 167 ITR 471 (SC);
ii. Concord of India Insurance Co. Ltd., Vs. smt. Nirmala Devi and Others 118 ITR 507 (SC);
iii. Radha Krishna Rai Vs. Allahabad Bank & Others [2009] 9 SCC 733;
iv. CIT Vs. West Bengal Infrastructure Development Finance Corporation Limited [2011] 334 ITR 269 (SC);
v. Improvement Trust, Ludhiana Vs. Ujagar Singh & Ors. in Civil Appeal No.2395 of 2008 (SC);
vi. Ram Nath Sao Vs. Gobardhan Sao reported in AIR 2002 SC 1201;

4. On the other hand, Ld.DR submitted that the assessee only build up a story to condone the delay, there is no reasonable cause for inordinate delay, which shall not be condoned. In this regard, Ld.DR relied on the decision of the Co-ordinate Bench of the Tribunal in the case of Smt. Rajalakshmi Vettrivel Vs. ACIT in ITA Nos.1106, 1107, 1108, 1109, 1110 & 1111/Mds/2017, dt.31-08-2017, wherein it was held as under:

"6. I have considered the rival submissions and perused the orders of the lower authorities impugned in these appeals. As far as the delay in filing these appeals by 744 days against the common appellate order of the CIT(A), viz. ITA No. 76 to 81/09-10 dated 19.02.2015 is concerned, one has to admit that the delay involved is inordinate and not marginal.

6.1 It is settled position of law that it is only marginal delays that can be condoned, and not inordinate delays running into several years. We may at this juncture, refer to the Third Member decision of Tribunal (Chennai) in the case of Jt. CIT v/s. Tractors & Farms Ltd. (104 ITD 149)-TM, wherein drawing out a distinction between normal delay and inordinate delay, it has been observed, vide head-note on page 150 of the Reports (104 ITD) as follows-

"A distinction must be made between a case where the delay is inordinate and a case where the delay is of a few days. Whereas in the former case, the consideration of prejudice to the other side will be a relevant factor, so the case calls for more

cautious approach, in the latter case, no such consideration may arise and such a case deserves a liberal approach. No hard and fast rule can be laid down in this regard. The Court has to exercise the discretion on the facts of each case, keeping in mind that in considering the expression 'sufficient cause', the principle of advancing substantial justice is of prime importance."

7. That being so, the case-law relied before us by the learned counsel for the assessee has no application to the facts of the present case. Further I make it clear that there is no hard and fast rule which can be laid down in the matter of condonation of delay and Courts should adopt a pragmatic approach and discretion on the facts of each case keeping in mind that in considering the expression 'sufficient cause' the principles of advancing substantial justice is of prime importance and the expression 'sufficient cause' should receive a liberal construction. A liberal view ought to be taken in terms of delay of few days. However, when there is inordinate delay, one should be very cautious while condoning the delay. The delay of 744cannot be condoned simply because the assessee's case is hard and calls for sympathy or merely out of benevolence to the party seeking relief. In granting the indulgence and condoning the delay, it must be proved beyond the shadow of doubt that the assessee was diligent and was not guilty of negligence whatsoever. The sufficient cause within the contemplation of the limitation provision must be a cause which is beyond the control of the party invoking the aid of the provisions. The Supreme Court in the case of Ramlal v. Rewa Coalfields Ltd., AIR 1962 SC 361 has held that the cause for the delay in filing the appeal which by due care and attention could have been avoided cannot be a sufficient cause within the meaning of the limitation provision. Where no negligence, nor inaction, or want of bona fides can be imputed to the assessee a liberal construction of the provisions has to be made in order to advance substantial justice. Seekers of justice must come with clean hands. In the present case, the reasons advanced by the assessee do not show any good and sufficient reason to condone the delays. The delays are not properly explained by the assessee. There is no reason for condoning such delay in this case. The delay is nothing but negligence and inaction of the assessee which could have been very well avoided by the exercise of due care and attention. Though the assessee has said that the divorce proceedings initiated by her spouse were the reason for delay in filing these appeals, there is no iota of evidence of such proceedings before any Court. Hence, there exists no sufficient or good reason for condoning inordinate delays of more than 744 days in filing appeal before us. Accordingly, these appeals are dismissed as barred by limitation.

8. I accordingly decline to condone the delay of 744 days, and dismiss these six appeals of the assessee as barred by limitation".

4.1. Further, he relied on the order of the Co-ordinate Bench of the Tribunal in the case of Dr.Raveendra M.Madraki Vs. ITO in ITA No.670/Bang/2019 (AY.2014-15), dt.10-02-2022, wherein it was held as under:

"6. We have heard both the parties and gone through the petition filed by the assessee, his affidavit and also the confirmation letter filed by Advocate, Mr. Prakash R. Badiger. The assessee explained the delay of 310 days on the

reason that on the advise of his CA, he handed over the appeal papers to Prakash R. Badiger, Advocate, Dharwad who failed to take necessary steps to file appeal before this Tribunal and thereafter he engaged M/s. K.R. Prasad, Advocates, Bangalore to file appeal. The assessee also furnished a confirmation letter from Mr. Prakash R. Badiger, Advocate, Bangalore stating that due to eagerness or immaturity, he accepted the income tax brief, but not able to deliver and there was a delay from his end.

7. However, the assessee has not produced any evidence of his CA, Mr. Sharanagouda Patil who advised assessee to contact Mr. Badiger, Advocate. Further, there is no evidence to suggest about the date of handing over the documents to Advocate and it is not mentioned what are the papers given to Mr. Badiger for preparation of filing of appeal and what is the advise given to the assessee during this 310 days. There is no material to suggest to suggest the professional charges so as take up filing of appeal before the Tribunal. The assessee has failed to bring any material on record to prove his bonafide attempt in filing the appeal. The assessee merely furnished one letter from Mr. Badiger, Advocate for seeking condonation of delay in filing the appeal along with affidavit. Except these, the assessee has not brought out any other material to prove his bonafide attempts to file the appeal. In our opinion, the assessee has not acted with due diligence in prosecuting the appeal. On the other hand, the assessee was negligent in his attitude in taking steps to file the appeal. In the absence of any evidence to prove the bonafides of the assessee, except the self-serving documents, the inordinate delay of 310 days in filing the appeal before the Tribunal cannot be condoned. There are 3 persons involved in this case viz., the assessee, his CA Shri Sharanagouda Patil and Shri Prakash R. Badiger, Advocate, who are required to explain the delay. They are not illiterate and they very well know the law. Ignorance of law is no excuse. We may refer to the judgment of the Hon'ble Supreme Court in the case of The Swadeshi Cotton Mills Co. Ltd. v. The Govt. of UP & Ors. (1975) 4 SCC 378 wherein it was held as follows:-

"….. But we are in agreement with the High Court on the other two grounds. As mentioned earlier, the impugned assessments were made in 1949. The writ petition was filed in 1956. The explanation given by the petitioner for this long delay is that he did not know the correct legal position and he came to know about the same after the decision of the Allahabad High Court in the Commissioner of Sales Tax, U.P. Vs. Modi Food Products Ltd. Every individual is deemed to know the law of the land. He courts merely interpret the law and do not make law. Ignorance of law is not an excuse for not taking appropriate steps within limitation. Therefore the argument that the appellant did not know the true legal position is not one that can be accepted in law. …."

8. Further, in the present case, there is no denial on the part of the assessee about the service of the order on the assessee and after receipt of the order of the CIT(Appeals), to whom the assessee wants to entrust the work of filing appeal before the Tribunal is his own concern and this explanation does not constitute sufficient ground to condone the delay. Therefore we find no merit in the application for condonation of delay. Accordingly, we are of the

considered view that the assessee has failed to make out a sufficient and reasonable cause for condonation of delay and reject the petition for condonation of delay. Being so, we refrain from going into other grounds of appeal on merits.

9. In the result, the appeal of the assessee is dismissed in limine".

Thus, he submitted that there was inordinate delay of 678 days pre-covid delay shall not be condoned as the assessee was very negligent in his acts. He prayed to confirm the order of the Ld.CIT(A).

5. We have heard the contentions of both the parties and perused the material on record. In this case, there was an actual delay of 951 days, out of which 273 days relates to post-covid delay, which need not to be considered at this stage. We have to consider only the delay of 678 days in filing of appeal before this Tribunal. The assessee explained delay on account of *ex-parte* order passed by the CIT(A) in view of the non-participation of assessee's assigned counsel before the CIT(A) and the assessee is not well educated, wholly depends upon the assessee's consultant for disposal of the appeal before the CIT(A). The assessee was not aware of the proceedings before the CIT(A) and also *ex-parte* dismissal of the appeal by the CIT(A) only came to know about CIT(A) when the assessee approached new consultant for filing of return of income and the same was explained by the assessee by way of affidavit before us. No counter affidavit is filed by the department stating the above averments made by the assessee is not banafide. At this point it is appropriate to go the judgment of Hon'ble Supreme Court in the case of Collector, Land Acquisition Vs. Mst.Katiji & Ors [167 ITR 471] (SC) wherein held that :

> *(1) Ordinarily, a litigant does not stand to benefit by lodging an appeal late.*
>
> *(2) Refusing to condone delay can result in a meritorious matter being thrown at the very threshold and cause of justice being defeated. As against this, when delay is condoned, the highest that can happen is that a cause would be decided on merits after hearing the parties.*
>
> *(3) "Every day's delay must be explained" does not mean that a pedantic approach should be made. Why not every hour's delay, every*

second's delay? The doctrine must be applied in a rational, common sense and pragmatic manner.

(4) When substantial justice and technical consideration are pitted against each other, the cause of substantial justice deserves to be preferred, for the other side cannot claim to have vested right in injustice being done because of a non-deliberate delay.

(5) There is no presumption that delay is occasioned deliberately, or on account of culpable negligence, or on account of mala fides. A litigant does not stand to benefit by resorting to delay. In fact, he runs a serious risk.

(6) It must be grasped that the judiciary is respected not on account of its power to legalise injustice on technical grounds but because it is capable of removing injustice and is expected to do so".

5.1. In our opinion, where substantial justice and technical consideration are pitted against each other, the cause of substantial justice deserves to be preferred, for the other side cannot claim to have vested right for injustice being done because of non-deliberate delay. In the case on our hand, the issue on merit, regarding payment of service tax beyond due date said to be covered in favour of the assessee. Further, the assessee in this case, less educated and he has only dependent upon the consultant, went before the CIT(A). He was not aware of any prejudice before the CIT(A) and he went to new consultant for filing new return of income for subsequent assessment year. Being so, the assessee is having good and sufficient reasons in not filing the appeal in time. Accordingly, we inclined to condone the delay and admit the appeal for adjudication. Accordingly, the appeal is admitted for adjudication.

6. Now we will proceed on merits of grounds raised by the assessee. The first ground is with regard to the disallowance of Employees' Contribution to EPF beyond due date, by invoking Section 36(1)(va) of the Act. In our opinion, the CIT(A) already deleted the addition made on this count in para 4.2 of this order being so this ground of appeal is infructuous accordingly the same is dismissed.

7. Next ground is with regard to the addition of Rs.46,24,823/- in respect of the service tax collected and not remitted to the Government account.

The facts of the issue are that the assessee collected a sum of Rs.46,24,823/- towards service tax payment, which was not deposited to the Government exchequer and the same was made as an addition by the lower authorities, invoking the provisions of Section 43B of the Act. The contention of the Ld.AR is that service tax liability was never claimed as expenditure in the P&L A/c to determine the net profit chargeable to tax. Further it was submitted that service tax actually collected but not remitted by the assessee. Further, he submitted that addition u/s.43B is sustainable in view of the following:

a. It is submitted that the language of Section 43B is expressly clear in confining itself to only a deduction otherwise allowable under this Act shall be allowed in computing the income referred to in Section 28 of that previous year in which such sum is actually paid by him.

b. The AO records that Section 43B is applicable even though it is not claimed as deduction in the profit and loss account for the reason that TDS is required to be made on the gross value inclusive of service tax and therefore the service tax value serves is required to be considered in the income chargeable to tax. In this regard, the AO failed to appreciate that the department vide Circular No.1/2014 has pronounced its position that TDS is to be deducted on the income portion in the invoice and service tax is not to be included. The AO having ignored the binding circular of the department, the addition stands to be the one made without proper authority under law and deserves to be deleted.

c. Further, the matter is no longer res integra, as the following Co-ordinate Bench decisions have held that addition u/s.43B can only be made if it is claimed as deduction in the P&L A/c:

    i. N R Kumaraswamy Vs. ITO in ITA No.1778/Bang/2017, dated 31-05-2018;

ii. Ken Consulting Pvt. Ltd. Vs. DCIT in ITA No.301/Bang/2019, dated 15-06-2019;

Therefore, in view of the decisions of the Co-ordinate Bench, it is humbly submitted that the addition deserves to be deleted in the facts and circumstances of the case.

7.1. On the other hand, Ld.DR relied on the orders of the lower authorities.

8. We have heard the main argument of Ld.AR that assessee has not collected above service tax and only on collection, it should be payable to the Government exchequer. For this purpose, he relied on various judgments, specifically Hon'ble Bombay High Court in the case of CIT Vs. Ovira Logistics P. Ltd [377 ITR 129] (Bom) and also submitted that the service tax has not been shown as expenditure in the P&L A/c while computing income of the assessee. In our opinion, when the assessee collected the amount, it should not kept it with them and same should be deposited to the Government exchequer within the specified date and time. Further, the Tribunal in ITA No.3417/Bang/2018 in the case of Wyzmindz Solutions Pvt. Ltd., Vs. ITO, dt.30-01-2020, held as under:

"6. I have heard the rival submissions and perused the material on record. In this case, the assessee has collected an amount of Rs.48,82,245 as service tax and not remitted the same to the Government exchequer, before the due date of filing of the return of income. As such, the issue whether the provisions of section 43B of the I.T.Act applies to service tax, which is not paid before the due date of filing of the return. It was considered by the co-ordinate Bench of the ITAT, Hyderabad Benches in the case of M/s.Bartronics India Ltd. v. ACIT [ITA No.2188 and 2189/Hyd/2011 – order dated 31.05.2012] that when the assessee has not paid the service tax as required under the provisions of section 43B, which is also very much covered u/s 43B of the I.T.Act. The provisions of section 43B of the Act is very clear and it states that "any sum payable by the assessee by way of tax, duty, cess or fee, by whatever name called, under any law for the time being in force". Therefore, even the service tax is liability which covers u/s 43B of the Act and non-payment of the same within the ITA No.3417/Bang/2018 M/s.Wyzmindz Solutions Pvt.Ltd. 7 stipulated time as specified u/s 43B of the Act attracts disallowance. Now the question is that when the assessee has not claimed it as expenditure in the profit and loss account, could it be disallowed u/s 43B of the Act. This was considered by the Hon'ble Apex Court in the case of Chowringhee Sales Bureau P. Ltd. v. CIT [(1973) 87 ITR 542 (SC)], in which it was held that the sales tax collected by the assessee is revenue receipt even if it is shown by the assessee under non-revenue head and such treatment by the assessee is not decisive. Further, in the case of M/s.Jain Christopher v. DCIT in ITA No.855/Bang/2012 – order dated 12.04.2013, it was held as under:-

"7.2 During the course of assessment proceedings, the AO observed that a sum of Rs.29 lakhs representing service tax collected by the assessee had not been paid, but, was shown as 'outstanding liability'. Being queried, it was explained that it had not preferred any claim for deduction and, thus, it was argued, the question of disallowance u/s 43B of the Act does not arise. The AO took a view that even though the assessee had not claimed the same in its P & L account as an expenditure and, therefore, section 43B has no application. However, he was of the view that the fact remains that service tax collected by the assessee but not paid to the Government account up-to the end of the financial year or even up-to the date of filing of the return of income and, thus, by not including this amount in its service, it had clearly made a claim indirectly. As rightly highlighted by the CIT(A), the assessee's plea that sales-tax was different from service tax cannot be accepted in the present circumstance as what the assessee was a firm of Chartered Accountants is selling is services and not goods, so the tax applicable is service tax which stands on the same bracket as sales tax in terms of services rendered as sales tax holds for goods sold. We have also observed that the AO had pointed out that the said amount has been included as business receipts in its TDS Certificates and as such, the same should have been included in its receipts. This has not been precisely done by the assessee. The case laws relied on by the assessee is dealt with as under: (i) ACIT v. Real Image Media Technologies (P) Ltd. (ITAT Chennai): 7.2.1 The assessee was running a recording and dubbing studio, production of advertisement, films and television serials etc., as well as in software development. The amount of service tax included in bills issued but not received. Accordingly, the Hon'ble Tribunal had recorded its findings that 'As per s. 68 of Finance Act, 1994 read with rule 6 of Service Tax Rules, 1994, the service tax becomes payable only on receipt of service tax from the client. Therefore, the amount of service tax included in bills but not received could not be disallowed under s. 43B'. After analysing the relevant provisions of Income tax Act as well as Service Tax Act, the Tribunal had, further, recorded its findings as under:

"12……From a plain reading of the above provision it becomes clear that the rigour of this provision would be attracted only in a case where an item is allowable as deduction but because of the failure to make payment such deduction will not be allowed. It can be argued that in the case of ST also the assessee does not claim deduction since it has been held that non-payment of Sales-tax would attract provisions of section 43B, but that is being done on the basis of the principles laid down by the Hon'ble Supreme Court in the case of Chowranghee Sales Bureau Ltd. V CIT 110 ITR 385 that Sales-tax is part of the trading receipt. Further, section 145A clearly provides that for the purpose of determining income under the head profits and gains of business or profession, the amount of purchase and sales i.e. turnover would include any tax, duty cess or fee. Therefore, the rigour of section 43B may be applicable in the case of Sales-tax or Excise Duty but the same cannot be said to be the position in case of Service-tax because of two reasons. Firstly, the assessee is never allowed deduction on account of service tax which is collected on behalf of the Govt. and paid to the Govt. accordingly. Therefore, a service provider is merely acting as an agent of the Govt. and is not entitled to claim deduction on account of service tax. Hence, on this account alone addition u/s 43B could not be made and the same has been correctly deleted by the CIT(Appeals)".

However, in the instant case, as admitted by the assessee, service tax has been collected but not paid to the Government account either up-to the end of the financial year or even up-to the date of filing of the return of income. Thus, the case law relied on by the assessee is distinguishable and cannot come to the rescue of the assessee.

(ii) CIT v. Noble and Hewitt India (P) Ltd (Del) 7.2.2 The Hon'ble Delhi High Court was predominantly concerned with the disallowance of deduction by invoking the provisions of section 43B of the Act. The Hon'ble Delhi High Court was not considering the issue whether the service tax collected and the remaining unpaid till the due date of furnishing of the return forms the part of the total income for the current year. (iii) DCIT v Manish M Chheda 29SOT 138 – Mumbai ITAT 7.2.3 In the above case, the Hon'ble Mumbai Tribunal was considering the applicability of section 28(iv) of the I T Act. In the instant case, it is an admitted fact that during the course of assessee's profession, a sum of Rs.29,60,000/- was realised/collected as service tax payable and the same is not capital receipt. The moment the service tax is realised, it becomes payable to the Govt. account and if it is not paid, it partakes the character of income of the assessee, since the assessee could utilise this amount in any manner whatsoever, there is no restriction placed on its utilisation. This is amply clear from the TDS certificate furnished by the assessee and also the credit appearing in the assessee's bank account. Therefore, to arrive at the professional income, the service tax realised should have been included in the gross receipts unless paid to Government exchequer within the due date of filing of return. Since service tax realised is included in the total income, the same is to be allowed as a deduction in the year it is paid to the Government account. In the instant case, this is what has been done by the learned CIT(A). The CIT(A) had allowed the alternative plea of the assessee and had directed the Assessing Officer to deduct the service tax when the payment is made to the Govt. account in the subsequent year. Therefore, we find there is no merit in the contention raised on behalf of the assessee and this issue is decided against the assessee. It is ordered accordingly."

6.1 Further, in the case of M/s.Hemkunt Infratech (P) Ltd. v. DCIT [ITA No.6683/Del/2017 – order dated 23.03.2018], the Delhi Benches of the Tribunal held as under:- "6. After hearing both the sides and perusing the entire material available on record, we observe that there is a credit balance of Rs.1,16,09,924/- at the end of the year towards expenses payable. The assessee submitted that it is service tax liability, which arose due to crediting the service tax received from the service recipients. The assessee has challenged before us, the disallowance ofRs.85,26,467/- disallowed u/s. 43B of the Act. We observe that the assessee has recorded his turnover after deducting the service tax received and the service tax has been credited separately. In section 145, of the Act for determining the income chargeable under the head profits and gains of business or profession or income from other sources, the same is to be computed in accordance with either cash or mercantile system of accounting regularly employed by the assessee. The said provisions were substituted by the Finance Act, 1995 w.e.f. 01.04.1997. Under section 145A of the Act, it is provided that notwithstanding anything to the contrary contained in clause(a) to section 145, the valuation of purchase and sale of goods and inventory, for the purpose of determining the income chargeable under the head profits and gains of business or profession, shall be (i) in accordance with method of accounting regularly employed by the assessee; and (ii) further adjusted to include the amount of any tax, duties, cess or fees, by whatever name called, actually paid or incurred by the assessee, to bring the goods to the place of its location and condition, as on the date of valuation. As per the explanation under the said clause, it is pointed out that for the purpose of this section, any tax, duties, cess or fees, by whatever name called, under any law for the time being in force, shall include all such payments, notwithstanding any right arising as a consequence to such payments. Sub-clause (b) talks of interest received by the assessee on compensation or enhanced compensation, which is not relatable to the issue before us. The aforesaid provisions of section 145A of the Act have been substituted by the Finance

(No.2) Act, 2009 w.e.f. 01.04.2010. Prior to its substitution, which was inserted by the Finance (No.2) Act, 1998 w.e.f. 01.04.1999, the section provided the provision relatable to the valuation of purchase and sale of goods and inventory, for the purpose of determining the income chargeable under the head profits and gains of business or profession and no clause (b) was provided i.e. in respect of income received by the assessee on compensation or on enhanced compensation. In view of the amended provisions of the Act, which came into effect from 01.04.1999 for valuing the purchases and sales of goods and also for valuing the inventory, while determining the income chargeable under the head profits and gains of business or profession, it has been provided that the said valuation would be in accordance with the method of accounting regularly employed by the assessee i.e. either mercantile or cash. Further, adjustment is to be made to include the amount of any tax, duties, cess or fees, by whatever name called, actually paid or incurred by the assessee to bring the goods to the place of its location and condition, as on the valuation date. In other words, where any expenditure is actually paid or incurred by the assessee by way of any tax, duties, cess or fees, by whatever name called, then adjustment is to be made both in the valuation of purchase and sale of goods and also in the valuation of inventory to include the aforesaid amounts while determining the income chargeable under head profits and gains of business or profession. The assessee has separately accounted for the service tax collected is also the indirect part of turnover because it is received along with turnover. The assessee has not shown any invoice raised by him before us as per service tax Rules, which is mandatory for the service provider to issue invoice to the service recipient. He has also not produced any evidence regarding payment received from service recipients as to how they have paid - separately or inclusive of service Tax. He has also not produced any evidence regarding whether the TDS has been remitted on payment after excluding the service tax. After going through the paper book filed by the assessee, we observe that the assessee has utilized service tax credit towards payment of duty on capital goods and as per Reverse Charge Mechanism. Therefore, it is necessary to discuss the relevant provisions of the Cenvat Credit Rules, 2004 as well as section 43B of the IT Act. 7. Section 43B(a) is as under :

43B. Notwithstanding anything contained in any other provision of this Act, a deduction otherwise allowable under this Act in respect of— (a) any sum payable by the assessee by way of tax, duty, cess or fee, by whatever name called, under any law for the time being in force, or 8. Rule 4 of the CENVAT Credit Rules, 2004 reads as under : Rule 4. Conditions for allowing CENVAT credit.- (1) The CENVAT credit in respect of inputs may be taken immediately on receipt of the inputs in the factory of the manufacturer or in the premises of the provider of output service: Provided that in respect of final products, namely, articles of jewellery falling under heading 7113 of the First Schedule to the Excise Tariff Act, the CENVAT credit of duty paid on inputs may be taken immediately on receipt of such inputs in the registered premises of the person who get such final products manufactured on his behalf, on job work basis, subject to the condition that the inputs are used in the manufacture of such final product by the job worker.

(2) (a) The CENVAT credit in respect of capital goods received in a factory or in the premises of the provider of output service at any point of time in a given financial year shall be taken only for an amount not exceeding fifty per cent. of the duty paid on such capital goods in the same financial year: Provided that the CENVAT credit in respect of capital goods shall be allowed for the whole amount of the duty paid on such capital goods in the same financial year if such capital goods are cleared as such in the same financial year. Provided further that the CENVAT credit of the

additional duty leviable under sub-section (5) of section 3 of the Customs Tariff Act, in respect of capital goods shall be allowed immediately on receipt of the capital goods in the factory of a manufacturer. Provided also that where an assessee is eligible to avail of the exemption under a notification based on the value of clearances in a financial year, the CENVAT credit in respect of capital goods received by such assessee shall be allowed for the whole amount of the duty paid on such capital goods in the same financial year.

Explanation.- For the removal of doubts, it is hereby clarified that an assessee shall be "eligible" if his aggregate value of clearances of all excisable goods for home consumption in the preceding financial year computed in the manner specified in the said notification did not exceed rupees four hundred lakhs. (b) The balance of CENVAT credit may be taken in any financial year subsequent to the financial year in which the capital goods were received in the factory of the manufacturer, or in the premises of the provider of output service, if the capital goods, other than components, spares and accessories, refractories and refractory materials, moulds and dies and goods falling under heading 6805, grinding wheels and the like, and parts thereof falling under heading 6804 of the First Schedule to the Excise Tariff Act, are in the possession of the manufacturer of final products, or provider of output service in such subsequent years.

Illustration.- A manufacturer received machinery on the 16th day of April, 2002 in his factory. CENVAT of two lakh rupees is paid on this machinery. The manufacturer can take credit upto a maximum of one lakh rupees in the financial year 2002-2003, and the balance in subsequent years. The CENVAT credit in respect of the capital goods shall be allowed to a manufacturer, provider of output service even if the capital goods are acquired by him on lease, hire purchase or loan agreement, from a financing company. (4) The CENVAT credit in respect of capital goods shall not be allowed in respect of that part of the value of capital goods which represents the amount of duty on such capital goods, which the manufacturer or provider of output service claims as depreciation under section 32 of the Income-tax Act, 1961(43 of 1961). (5) (a) The CENVAT credit shall be allowed even if any inputs or capital goods as such or after being partially processed are sent to a job worker for further processing, testing, repair, re-conditioning, or for the manufacture of intermediate goods necessary for the manufacture of final products or any other purpose, and it is established from the records, challans or memos or any other document produced by the manufacturer or provider of output service taking the CENVAT credit that the goods are received back in the factory within one hundred and eighty days of their being sent to a job worker and if the inputs or the capital goods are not received back within one hundred eighty days, the manufacturer or provider of output service shall pay an amount equivalent to the CENVAT credit attributable to the inputs or capital goods by debiting the CENVAT credit or otherwise, but the manufacturer or provider of output service can take the CENVAT credit again when the inputs or capital goods are received back in his factory or in the premises of the provider of output service. (b) The CENVAT credit shall also be allowed in respect of jigs, fixtures, moulds and dies sent by a manufacturer of final products to,- (i) another manufacturer for the production of goods; or (ii)a job worker for the production of goods on his behalf, according to his specifications. (6) The Deputy Commissioner of Central Excise or the Assistant Commissioner of Central Excise, as the case may be, having jurisdiction over the factory of the manufacturer of the final products who has sent the input or partially processed inputs outside his factory to a job-worker may, by an order, which shall be valid for a financial year, in respect of removal of such input or partially processed input, and subject to such conditions as he may impose in the interest of

revenue including the manner in which duty, if leviable, is to be paid, allow final products to be cleared from the premises of the job-worker. (7) The CENVAT credit in respect of input service shall be allowed, on or after the day which payment is made of the value of input service and the service tax paid or payable as is indicated in invoice, bill or, as the case may be, challan referred to in rule 9.

9. As per Rule 6(1) of the Service Tax Rules, 1994, in case of company, service tax is to be paid on a monthly basis by 5th of the following month (in case of e-payment, by 6th of the month immediately following the respective month). However, the payment for the month of March is required to be made by 31st of March itself. As per Rule 6(4) of the Service Tax Rules, 1994, the assessee can pay for provisional payment of service tax in case he is not able to correctly estimate the tax liability. In such a situation, he may request in writing to the jurisdictional Assistant/Dy. Commissioner for the same.

10. As per section 73A of the Finance Act, 1994, any person who has collected any sum on account of Service Tax, is under obligation to pay the same to the Government. He cannot retain the sum so collected with him by contending that the service tax is not payable.

11. As per section 173A of the Service Tax Act, in case, the service tax is collected, the provision is as under :

173A. Service Tax collected from any person to be deposited with Central Government:- (1) Any person who is liable to pay service tax under the provisions of this Chapter or the rules made thereunder, and has collected any amount in excess of the service tax assessed or determined and paid on any taxable service under the provisions of this Chapter or the rules made there under from the recipient of taxable service in any manner as representing service tax, shall forthwith pay the amount so collected to the credit of the Central Government. (2) Where any person who has collected any amount, which is not required to be collected, from any other person, in any manner as representing service tax, such person shall forthwith pay the amount so collected to the credit of the Central Government. (3) Where any amount is required to be paid to the credit of the Central Government under sub-section (1) or sub-section (2) and the same has not been so paid, the Central Excise Officer shall serve, on the person liable to pay such amount, a notice requiring him to show cause why the said amount, as specified in the notice, should not be paid by him to the credit of the Central Government. (4) The Central Excise Officer shall, after considering the representation, if any, made by the person on whom the notice is served under subsection (3), determine the amount due from such person, not being in excess of the amount specified in the notice, and thereupon such person shall pay the amount so determined. (5) The amount paid to the credit of the Central Government under subsection (1) or subsection (2) or sub-section (4), shall be adjusted against the service tax payable by the person on finalisation of assessment or any other proceeding for determination of service tax relating to the taxable service referred to in sub-section (1). (6) Where any surplus amount is left after the adjustment under subsection (5), such amount shall either be credited to the Consumer Welfare Fund referred to in section 12C of the Central Excise Act, 1944 or, as the case may be, refunded to the person who has borne the incidence of such amount, in accordance with the provisions of section 11B of the said Act and such person may make an application under that section in such cases within six months from the date of the public notice to be issued by the Central Excise Officer for the refund of such surplus

amount.] 12. We further observe that the point of taxation as per Rule 3 of Point of Taxation Rules, 2011 is as under : RULE 3. Determination of point of taxation. - (Notification No. 18/2011- ST dt. 01.03.2011 as amended). For the purposes of these rules, unless otherwise provided, point of taxation shall be,- (a) the time when the invoice for the service provided or agreed to be provided is issued : Provided that where the invoice is not issued within the time period specified in rule 4A of the Service Tax Rules, 1994, the point of taxation shall be the date of completion of provision of the service. (b) in a case, where the person providing the service, receives a payment before the time specified in clause (a), the time, when he receives such payment, to the extent of such payment : Provided that for the purposes of clauses (a) and (b), - (i) in case of continuous supply of service where the provision of the whole or part of the service is determined periodically on the completion of an event in terms of a contract, which requires the receiver of service to make any payment to service provider, the date of completion of each such event as specified in the contract shall be deemed to be the date of completion of provision of service; (ii) wherever the provider of taxable service receives a payment up to rupees one thousand in excess of the amount indicated in the invoice, the point of taxation to the extent of such excess amount, at the option of the provider of taxable service, shall be determined in accordance with the provisions of clause (a). Explanation - For the purpose of this rule, wherever any advance by whatever name known, is received by the service provider towards the provision of taxable service, the point of taxation shall be the date of receipt of each such advance."

13. After considering the above provisions, it is clear that the assessee has to pay service tax within due date as set out under the above provisions either by way of cash/cheque or by way of availing CENVAT credit as per Rules as stated above, but the assessee did not do so. The liability of service tax had also arisen as per the point of Taxation Rules, as stated above.

14. Now, we have to examine the case of the assessee in the light of the above provisions. During the impugned year, the assessee has credit balance of service tax payable as on 31.03.2013 of Rs.1,16,09,924/- which was to be paid upto 31.03.2013 by the assessee, but he did not pay. Further, the assessee had paid a sum of Rs.30,83,457/- before filing of IT return. As per section 43B(a), the above outstanding payment was to be paid upto the date of filing of return of income. As per method of accounting, the assessee has also not included the service tax received by him in the turnover. In fact, the assessee was legally obliged to declare its turnover inclusive of service tax received. The assessee cannot be exonerated from its liability by saying that he accounted for the service tax received separately. Since the assessee did not pay service tax as contemplated u/s. 43B(a) and as per above provisions of Service Tax Act within the stipulated time, therefore, the ld. CIT(A) has rightly disallowed the same u/s. 43B of the IT Act. The case laws relied by the assessee are based on different footings as in all the decisions it was held that Service Tax was not at all payable because the service Tax was not received from the customer. The law prevailing at that particular time was that Service Tax was to be paid to the Government only when Service Tax is received from the service receiver to the service provider. Subsequently, there is change in the law which provides that Service Tax is to be deposited by the service provider even if service tax is not paid by the service receiver to the service provider. Therefore, in all those decisions it was held that service tax outstanding is hit by the provisions of Section 43B of the Income Tax Act. 1961. Due to the change in the law now those decisions does not help to the assessee. Moreover, the assessee has filed the service tax returns belatedly, i.e., for April to June on 16.04.2015, for July to September and half yearly from October to

March, 2013 on 08.07.2015. In view of all these facts, the ld. CIT(A) has rightly dealt with the issue in question by giving elaborate findings in the impugned order regarding confirmation of addition u/s. 43B of the Act, which we do not find fit to be interfered with. Accordingly, the appeal of the assessee deserves to be dismissed."

6.2 In view of the above binding precedents, I am of the opinion that the service tax collected by the assessee and not paid to the Government exchequer before the due date of filing of return, is to be disallowed, though it was not charged to the profit and loss account and it attracts the provisions of section 43B of the Act and the present provisions of section 145A of the Act cannot be applied in view of non obstante clause in section 43B of the Act".

8.1. Contrary to this, the Tribunal in the case of ITO Vs. Speed Trans Cargo Pvt. Ltd. in ITA No.1969/Bang/2019, dt.31-03-2021, held as under:

"7. We have heard rival submissions and perused the material on record. The learned DR contended that the amount of unpaid service tax amounting to Rs.4,35,91,191 whether it has claimed as deduction in the profit and loss account was never examined by the A.O. and the CIT(A) without giving an opportunity to the A.O. by placing reliance on the additional evidence allowed the appeal of the assessee. The learned AR does not have any grievance for remitting the issue to the A.O. to examine whether the unpaid service tax has been claimed as a deduction in the profit and loss account. Therefore, this issue is restored to the files of the A.O. The A.O. is directed to examine whether the assessee had claimed the unpaid service tax as an expenditure / deduction in the profit and loss account. In the event the same is not claimed as a deduction / expenditure, the A.O. shall not invoke the provisions of section 43B of the I.T.Act in view of the judgment of the Hon'ble Bombay High Court in the case of CIT v. Knight Frank (India) Pvt. Ltd. (supra). It is ordered accordingly".

8.2. At this point of time, we have to see whether the assessee has actually collected service tax and kept it with him, without remitting the same to the Government exchequer. The AO recorded the finding that the assessee has actually collected the service tax from it customer and not remitted to the Government exchequer. Contrary to this, the Ld.AR made a plea that it has not been actually verified by the AO and without examining, the AO took a decision that it has been collected and same was confirmed by the CIT(A) in the *ex-parte* order. In our opinion, it has to be verified in the light of judgement of Hon'ble Bombay High Court in the case of CIT Vs. Ovira Logistics P. Ltd [377 ITR 129] (Bom), cited supra.

8.3. Accordingly, we remit this issue to the file of AO to examine whether the assessee actually collected and received the amount and kept with him

without depositing to Government exchequer. If the assessee actually received from its customers and kept it without depositing the same within due date of filing of return of income u/s.139(1) of the Act, then only the AO has to invoke the provisions of Section 43B and bring that amount to tax. Ordered accordingly.

9. In the result, appeal of the assessee is treated as partly allowed for statistical purposes.

Order pronounced in the open court on 11th April, 2022

Sd/-	Sd/-
(BEENA PILLAI)	**(CHANDRA POOJARI)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Bengaluru, Dated: 11th April, 2022

TNMM

Copy to:

1. *The Appellant*
2. *The Respondent*
3. *The CIT(A) - 3, Bengaluru*
4. *The Pr. CIT - 3, Bengaluru*
5. *The DR, ITAT, Bengaluru*
6. *Guard File*

By Order

//True Copy//

Assistant Registrar
ITAT, Bengaluru