IN THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD "A" BENCH

Before: Ms. Annapurna Gupta, Accountant Member
And Shri Mahavir Prasad, Judicial Member

ITA No. 963/Ahd/2018 **Assessment Year 2014-2015**

M/s. Samrat Builders Plot No. 1, Vasna Hadmatiya Gam, Between sargasan to Section 4 Road, Gandhinagar-382010 PAN No. ABPFS7655B (Appellant)	Vs	DCIT, Gandhingar Circle, Gandhinagar (Respondent)

Appellant by : Shri S. N. Divatia, A.R.
Respondent by : Shri Urjit Shah, Sr. D.R

Date of hearing : 09-06-2022
Date of pronouncement : 22-06-2022

आदेश/ORDER

PER : ANNAPURNA GUPTA, ACCOUNTANT MEMBER:-

The present appeal has been filed by the Assessee against the order passed by the Commissioner of Income Tax (Appeals)-, Gandhinagar Ahmedabad, (in short referred to as CIT(A)), dated 08-01-2018, u/s. 250(6) of the Income Tax Act, 1961(hereinafter referred to as the "Act") pertaining to Assessment Year (A.Y) 2014-2015.

2. Ground raised by the assessee read as under:

1. The Learned CIT(A) has grievously erred in law and/or on facts in not considering the claim of service tax expenditure by the appellant allowable expenditure u/s 37(1) and has erred in upholding the addition of Rs. 1,27,31,534/-.
2. The Ld CIT(A) has grievously erred in law and/or on facts in wrongly interpreting section 37(1).
3. The Learned CIT(A) has grievously erred in law and/or on facts in not understanding and disregarding the actual facts of the case of the appellant who had submitted the correct facts of his case supported by the available documentary evidences.
4. The Learned CIT(A) has grievously erred in law and/or on facts in not considering and disregarding the submission made by the appellant during assessment proceedings and appellate proceedings.
Considering all the above submissions it is prayed to your honor that the addition of Rs. 1,27,31,534/- upheld by the CIT(A) may kindly be deleted.

2.1 Ld. Counsel for the assessee at the outset stated that the solitary issue involved in the appeal related to addition made of service tax paid by the assessee during the year amounting to Rs. 1,27,31,534/- . The addition being made for the reason that though the assessee had separately claimed the payment of service tax as expenses it had not credited service tax receipts from the customer in the profit and loss account for the year.

3. Ld.counsel for the assessee contended that the assessee was a Builder. He contended that it had been pleaded before the authorities below, that the service tax had not been separately collected by the assessee from its customer but it was included in the sale price only and therefore was not separately reflected in the Financial Statements of the assessee. He contended however that the Revenue authorities dismissed the explanation of the assessee. Ld. Counsel for the assessee contended that identical disallowance had been made in the succeeding year also i.e.

A.Y. 2015-16 by the A.O. and which was deleted by the Ld. CIT(A). Ld. Counsel for the assessee drew our attention to the assessment order for A.Y. 2015-16 placed before us paper book at page no. 38 to 40 pointing out identical disallowance of service tax paid during that year of Rs. 11,76,318/- on account of credit for collection from customers not reflected in its financial statements He thereafter drew our attention to the order of the Ld. CIT(A) for A.Y. 2015-16 placed before us paper book at page no. 41 to 48 .Drawing our attention to the same, he pointed out that before the Ld. CIT(A) also, the assessee had pleaded that the service tax component was included in the bills raised on the customers and was not separately charged. It was also pointed out to him that as per section 67 of the Finance Act, 1994, relating to Valuation of Taxable Services for charging Service Tax, whenever total consideration received did not mention anything separate about service tax then it was to be considered that the gross amount charged by the service provider was inclusive of service tax. He pointed that attention of the Ld. CIT(A) was drawn to the fact that the sale deed drawn with the customers did not bifurcate any component of the consideration received inclusive mentioning service tax therein. It was therefore contended that for all purposes, the sale consideration was to be treated as including service tax therein. Ld. Counsel for the assessee further pointed out that copies of service tax return for the said year along with ledger account of all the buyers from whom the collection had been received was furnished as evidence of his explanation. Further it was also contended that there was no concrete evidence with the department that the assessee had collected service tax not but accounted for same in its

books and it was merely based on surmises and conjectures. He drew our attention at Para 4.1 of the order making above the submission as under:

> *4.1. During the course of appellate proceedings, the appellant has made written submissions which are reproduced as under:-*
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> *"3. The Ld.A.O. has grievously erred in law and/or on facts in not considering the claim of service tax expenditure by the appellant as allowable expenditure u/s. 37(1) and has erred in making the addition of Rs. 11,76,318/- without properly understanding and/or disregarding the actual facts of the case of the appellant and misinterpreting the various documentary evidences submitted during the course of the assessment proceedings and misinterpreting the service tax laws vis a vis Income tax laws.*
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> *The facts of the case are as under:-*
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> a. *Initially when the schema is launched in the year August, 2010 the brochure is printed and as per the normal business practices it is always mentioned in the terms and conditions that all various charges which includes service tax shall be borne by the purchaser. The said brochure is not part of books of accounts and doesn't contain or indicate any information relating to the actual transaction taken place between the appellant and its customers. It is only an informative document for the public at large and doesn't tantamount to the actual transactions and the final understanding and deal between the appellant and its customers. Hence the Ld. A.O. is grievously erred in law and/or on facts in considering the said brochure as the base to disallow the service tax expenditure for the year under consideration.*
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> *(b) Further Ld. A.O. is grievously erred in law/or on facts in mentioning that the sale deed is specifically mentioning that service tax has to be borne by the buyer of the property, whereas the fact of the case is that the sale deed does not mention anything about the service tax expenditure and also doesn't mention as to who will or has borne the*

service tax expenditure. We are attaching herewith theone such particular sale deed entered into during the year under consideration on 13/08/2014 of Rs. 17.68.000/- with the buyer Jyoti Gulab Dandekar and others for buyer consideration (Ann-1). The said sale deed and all others sale deed entered into by the appellant doesn't mention any thing about the service tax component. When a sale deed is being entered into with a customer. It is conclusive evidence that all the amounts due, and collected from the customer have been received and the sale deed is being than executed for the total consideration actually received.

Hence considering the fact that the sale consideration received from all such customers is inclusive of the service tax, and considering the provisions of section 67. "Valuation of taxable services for charging service tax" of the Finance Act, 1994 whenever a total consideration received doesn't mention anything separate about the service tax, then it is considered under section 67(2) that the gross amount charged by a service provider is inclusive of service tax payable. In the case of the appellant, no separate amounts of service tax was either charged or recovered from any of its customers and the sales deed consideration was inclusive of the amount of service tax and hence the sales value shown in the profit and loss account is accordingly inclusive of service tax and hence as an when the service tax ws paid by the appellant in respect of the collection received during the year, the same was debited to the profit and loss account and claimed as the relevant expenditure as against the Income i.e. sales which is inclusive of the service receipt. And hence considering the fact of the case the Ld. A.O. is again mistaken in wrongly interpreting the sale deeds vis a vis the service tax to the laws. The appellant was obliged under the law to pay service tax to the Government even when such payment is not forthcoming from the client/customer. Therefore, it would be a deductible business expenditure u/s. 37(1). It is

undisputed that the obligation under theFinance Act 1994 to pay the service tax is on the assessee being the service provider. This obligation has to be fulfilled by the service provider whether or not it receives the service tax from its clients/ customers. Nonpayment of such service tax into the treasury would normally result indemand and penalty proceedings under the Finance Act, 1994. Therefore, the payment is on account of expediency, exclusively and wholly incurred for the purpose of business therefore deductible u/s. 37(1).

We are attaching herewith the relevant calculation of service tax of Rs. 11,76,318/- claimed as expenditure during the year which is 3.03% of the actual taxable collection received during the year Rs. 3,88,45,322/-.(ann-2),we are also attaching herewith the copies of the service tax return (Ann-3) and copies of the relevant ledger accounts of all the buyers from whom the collections have been received during the year under consideration (Ann-4).

(c) Hence considering the above facts and relevant applicable service tax laws and the entries in the books of the account and the documentary evidences as to the payment of service tax, it is crystal clear truth that the appellant have not received any separate amount from the various customers as service tax because of the agreed terms with the said customers and as the appellant have paid service tax from its own account, the said service tax is required to be borne by the appellant and the same being incurred during the normal course of the conducting the business of the appellant, the same is deductible expenditure incurred wholly and exclusively for the purpose of the business of the appellant and hence deductible u/s. 37(1). Further section 43B provides for deduction of certain expenses only in the year of payment, irrespective of method of accounting and as the said service tax would be covered under

the provision of section 43B(a) – "any tax, duty, cess, or fee payable under any law for the time being force", the same have been claimed only to the extent the same have been actually paid by the appellant during the F.Y. 2014-15 relevant to A.Y. 2015-16.

(d) It is further stated that there can be two ways of accounting adopted by an entity depending on whether members sale in Profit and loss account is excluding component or including component. In the first instance, service tax is separately recorded in the service tax payable ledger and net of service tax is recorded in P & L Account and in the second instance, sale is treated as inclusive of service tax. It is concluded that the appellant has adopted second instance, stated above and hence service tax expense was debited to P & L account whereas sale value shown at Income Side. The appellant have not separately collected any service tax from members and the sale deed value is inclusive of such service tax and hence the appellant has to pay the service tax and hence debited to profit and loss account on such payment and claimed as expenditure on such payment.

We are submitting herewith various documentary evidences such as copy of sale deed (Ann-1), copy of party ledger accounts (ann-4), copy of the service tax expenditure account (Ann-5), copy of the service tax return (Ann-3), profit and loss account and Balance sheet for a.Y. 15-16 (Ann-6), to prove that the appellant have not collected any separate service tax and appellant. Whereas the A.O. have no findings to prove otherwise that the appellant have collected separate services tax and not mentioned or accounted the same in the books of account maintained by the appellant. Considering all the above submission your honour is requested to kindly allow the claim of expenditure of service tax of Rs. 11,76,318/-.

Without prejudice to the above submission, Reliance is palced on the following:-

(a) CIT-III vs. Kaypee Mechanical India (Pvt.) Ltd. (2014) taxmann.com 363 (Guj.)
(b) ACIT vs. M/s. Prime Broking Co. (India) Ltd. ITA No. 5632/Mum/2012 (Mum Trib.)
(c) CIT-4 vs. M/s. Prime Broking Co. (India) Ltd. ITA No. 847/2014 (Bombay HC)

4. Ld.counsel for the assessee pointed out that after considering these submissions, the Ld. CIT(A) gave finding to the effect of being satisfied with the explanation of the assessee from the evidences furnished before him that the service tax component was included in the sale price and therefore was not reflected separately in its accounts. He drew our attention in this regard at Para 4.2 of the order as under:

4.2 I have considered carefully considered the facts of the case, submissions made by the appellant, remand report and the order of the A.O.. The facts as emerged from the discussion made by the Assessing Officer in the impugned assessment order are briefly stated as under:
(a) The appellant has debited the amount of Rs. 11,76,318/- towards service tax expenses which have been disallowed by the Assessing Officer by holding that since the appellant did not show the corresponding credit on account of collection of service tax from its customers, the expenses were not to be allowed. Whereas the appellant furnished the explanation that it was conscious decision for not demanding the service tax on sale of flats and the service tax liability was borne by the appellant firm itself. The A.O. further held that it was imperative on the part of the appellant to credit the service tax in the profit and loss account and deduction was to be allowed out of such collected service tax. It has also been recorded by the A.O. that no separate register of P & L Account or balance sheet reflected the collection of service tax or collectible service tax on the asset side of the balance sheet. He accordingly made the disallowance of Rs. 11,76,318/-.
(b) The appellant has submitted that it did not recover the service-tax separately and the sale consideration received from the sale of flats was inclusive and therefore, no separate receipts of service-tax were accounted for. It has been contended that the payment of service tax liability was a statutory liability which has been discharged by the appellant firm and had claimed the expenses so incurred as business expenditure. The appellant further contended that there is no relevance as to why there is no corresponding credit or service-tax collected when the service tax is paid. It has been further contended that a policy decision

of not collection the service tax from the purchasers of the flats in addition to the sale consideration was a commercial expediency for which it has relied on the decisions of Hon'ble High Courts in the following cases:-
(a) Kaypee Mechanical India (Pvt.) vs. CIT (Gujarat)
(b) Prime Broking Co. (India) Ltd. vs. CIT (Mumbai)

5. Ld. Counsel for the assessee contended that this identical issue has been thoroughly examined by the Ld. CIT(A) in A.Y. 2015-16 and after going through the books of accounts and other documents relating to service tax, he had given a categorical finding that there is no case at all of assessee having not accounted for service tax component in its receipt, the same being included in its sale consideration. He therefore contended that the order of the Ld. CIT(A) in the impugned year on this aspect needed to be reversed.

6. Ld. D.R. however relied on the order of the Ld. CIT(A).

7. We have heard both the parties. We have also gone through the order of the Ld. CIT(A). The addition on account of service tax which was paid by the assessee during the year amounting to Rs. 1,27,31,534/- has been primarily made for the reason that the assessee has not reflected receipt of the said tax in its books nor has he evidenced the fact of the receipt of service tax as a component included in its sale consideration. As pointed out by the Ld.counsel for the assessee, we find that this issue was examined at length by the Ld. CIT(A) in the succeeding year, i.e A.Y. 2015-16 and he had gone through all relevant documents pertaining to the issue including the service tax returns, the ledger account of the

customers/buyers, the sale deeds and the relevant provisions of the service Tax Act and had given a categorical finding, that the sale tax was collected by the assessee as a component of sale consideration , which was in consonance with the provisions of the law in this regard in the Service tax act also. Further the fact that the assessee had paid service tax to the service tax department was also noted, as also the fact that the service tax return had also been filed by the assessee reflecting the service tax payable on each bill raised. The Ld. CIT(A) noted that the difference in turnover as reflected in the service tax return and the books was also explained and after noting all the same, the CIT(A) held that there was no case at all for holding that the assessee had failed to book service tax receipts collected by it. The Ld. CIT(A) for all purposes accepted the explanation of the assessee in the said year. The Revenue has not brought to our notice any order of the ITAT or higher authority displacing the order of the Ld. CIT(A) for A.Y. 2015-16. The Revenue therefore has accepted the explanation of the assessee.

8. Moreover on going through the facts of the case, we are also of the view that the mere fact that the assesse had separately debited service tax in it profit and loss account and not credited the same in its profit and loss account cannot be the reason or basis for stating that the assessee has not credited these receipts in its books. As per the valuation Rules also relating to Service tax, if Service Tax is not separately collected in the bills it is to be presumed as included in the sales price. This fact has been confirmed in the case of the assessee by the Ld.CIT(A) in the succeeding year after going

through all relevant documents .There being no other material with the Revenue for arriving at a finding that the assessee has not disclosed this component of service tax, we find that the basis of addition made by the Revenue to be very far-fetched and illogical.

9. In view of the same, we delete the addition made of service tax amounting to Rs. 1,27,31,534/-.

10. Grounds of appeal raised by the assessee are allowed.

11. In effect appeal of the Assessee is allowed.

Order pronounced in the open court on 22 -06-2022

Sd/-	**Sd/-**
(MAHAVIR PRASAD)	**(ANNAPURNA GUPTA)**
JUDICIAL MEMBER *True Copy*	**ACCOUNTANT MEMBER**
Ahmedabad : Dated 22/06/2022	

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. Assessee
2. Revenue
3. Concerned CIT
4. CIT (A)
5. DR, ITAT, Ahmedabad
6. Guard file.

By order/आदेश से,

उप/सहायक पंजीकार
आयकर अपीलीय अधिकरण,
अहमदाबाद