

**IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH 'G' : NEW DELHI)**

**SHRI SHAMIM YAHYA, ACCOUNTANT MEMBER
and
SHRI CHANDRA MOHAN GARG, JUDICIAL MEMBER**

**ITA No.2220/Del./2017
(ASSESSMENT YEAR : 2012-13)**

ACIT, Circle 22 (2),
New Delhi.

vs.

M/s. S & A Finman Ltd.,
D – 7, 3rd Floor,
Defence Colony,
New Delhi – 110 024.
(PAN : AABCS7087D)

(APPELLANT)

(RESPONDENT)

ASSESSEE BY : Shri Rakesh Gupta, Advocate
Shri Somil Agarwal, Advocate
REVENUE BY : Shri Abhishek Kumar, Sr. DR

Date of Hearing : 30.11.2022
Date of Order : 14.12.2022

ORDER

PER SHAMIM YAHYA, ACCOUNTANT MEMBER :

This appeal by the Revenue is directed against the order of the Id.
CIT (Appeals)-14, New Delhi dated 09.12.2016 for the assessment year
2012-13.

2. The ground of appeal taken by the Revenue reads as under :-

“Whether the Id. CIT(A) was justified in deleting the addition of Rs.1,79,91,058/- made by the AO u/s 438 of the I. T.Act , 1961 on account of non depositing of Service Tax till 29.09.2012 i.e., before the due date of filing of its return of income, as per Annexure-IV of the 3CD Report. The Service Tax collected from the clients but not paid to the Service Tax Deptt. is an income of the assessee irrespective of the fact whether or not the Service Tax is routed through P&L Account of not.”

3. Brief facts of the case are that in this case, in the order passed under section 143 (3) of the Income-tax Act, 1961 (for short 'the Act'), AO noted that there were unpaid service tax amounting to Rs.1,79,91,057.80. AO opined that provisions of section 43B are applicable. He made the impugned addition by concluding as under :-

“As already discussed above, the assessee has not furnished any evidence in respect of payment of Service tax which was not paid till 29.09.2012 as per Annexure-IV of the 3CD Report, before the due date of filing of its return of income. Hence, the unpaid Service Tax amounting to Rs.1,79,91,058/- is disallowed as per the provisions of the section 43B of the I.T. Act, 1961 and added to the income of the assessee for the year under consideration. For the reasons mentioned above I am satisfied that the assessee has concealed its income by furnishing inaccurate particulars of its income, therefore, penalty proceedings u/s 271(1)(c) are initiated separately on this account.”

4. Upon assessee's appeal, Id. CIT (A) noted that assessee has submitted following before him :-

“During the course of appellate proceedings the Ld. AR vide his letter dated 23.11.2016 has submitted as under:-

1. While disallowing the unpaid service tax amounting to Rs.1,79,91,058/- (Annexure-9) for period up to 31.03.2012 u/s 43B, the learned ACIT has assumed that the service tax has been routed through Profit & Loss account and has been claimed as deduction.

It is abundantly clear that the said section is only applicable to the disallowance of any deduction otherwise allowable, what is charged or chargeable against the profits of

the assessee and have been claimed as an expense/deduction in the Profit & Loss Account of the assessee., though the same has not been paid by the assessee till the due date of filing of the return of income u/s 139(1).

It is to be noted that the service tax collected on services rendered, is a liability collected on behalf of the Government to be deposited to the credit of the Government account. It is not treated as an income nor is payment thereof treated as charge against profit or expenses in the Profit & Loss Account of the assessee.

In fact, it is not routed through Profit & Loss Account at all and never forms part of any head of income/ expenditure. It is neither an expense nor a deduction or a charge against the profits of the assessee. It is neither credited and included in income at the time of receipt nor it is debited at the times of paying to the Government.

In our case service tax collected is never treated as part of income nor is its payment treated as an expense/deduction or a charge against the profits of the assessee. It never forms part of Profit & Loss account of the company and is, therefore, not a deduction, otherwise allowable.

It is a liability for the company and it has to be paid to credit of the Government account to extinguish the said liability.

As such, this addition of Rs.1,79,91,058/- on account of incorrect interpretation and application of 438 is unjust and untenable.

The assessee has not failed in disclosure of all the relevant facts and is not liable for any concealment or initiation of the penalty proceedings.

The appellant company availed the benefit of VOLUNTARY COMPLIANCE ENCOURAGEMENT SCHEME, 2013 (VCES), and filed the declaration on 30.08.2013 covering the period up to 31.12.2012, under which the service tax was to be deposited on or before 31st December,

2014. As such appellant company was not assessee in default in any manner whatsoever, The Form VCES-2 (Annexure-10) with details of service tax liability period wise (Annexure-11) are the conclusive proofs that the service tax was paid in compliance of the VCES,2013 and discharge certificate was issued to the effect.

In view of the above, the addition of Rs.1,79, 91,058/- is sought to be deleted.”

5. Ld. CIT (A) agreed with the above submissions. He held that service tax is collected on services rendered which is a liability collected on behalf of the Government to be deposited to the credit of the Government account. It is not treated as an income nor the payment thereof is treated as charge against profit or expenses in the Profit & Loss account of the assessee. He noted that it is not routed through P&L account at all and never forms part of any head of income or expenditure. That it is a liability for the company and it has to be paid to credit of the Government account to extinguish the said liability. Therefore, he directed that the addition be deleted.

6. Against this order, Revenue is in appeal before us. We have heard both the parties and perused the records.

7. Ld. Counsel of the assessee submitted that the issue is squarely covered in favour of the assessee by several case laws in which it has been held that provisions of section 43B of the Act are not attracted in the case of service tax. In this regard, he referred to following case laws :-

- (i) CIT vs. Noble and Hewitt (I) (P) Ltd. (2008 305 ITR 324 (Del.);
- (ii) Srikakollu Subba Rao & Co. & Ors. Vs. UOI & Ors. (1988) 173 ITR 708 (AP HC);
- (iii) India Carbon Ltd. vs. Inspecting Assistant Commissioner of Income-tax (1993) 200 ITR 759 (Gau HC);
- (iv) CIT vs. Everest Litho Press (2006) 285 ITR 297 (Mad HC);
- (v) ACIT vs. Biotech Consortium India Ltd. ITA no.2841/Del/12 dated 09.08.2012, ITAT Delhi Bench;
- (vi) ACIT vs. Real Image Media Technologies (2008) 114 ITD 573, ITAT Chennai Bench;
- (vii) Wadhwa Residency (P) Ltd. vs. ACIT (2018) 95 taxmann.com 294, Mumbai Bench;
- (viii) DCIT vs. M/s. M.C. Retail Pvt. Ltd., ITA No.419/Mum/2017 dated 28.09.2018, ITAT Mumbai Bench;
- (ix) Envision Enterprise Solutions Pvt. Ltd. vs. ITO, ITA No.315/Hyd/2016, dated 12.08.2016, ITAT Hyderabad Bench;
- (x) Vijay Associates Wadhwa Construction Pvt. Ltd. vs. Addl.CIT, ITA No.5460/Mum/2015 dated 16.01.2018, ITAT Mumbai Bench; and
- (xi) Planet Advertising Pvt. Ltd. vs. ACIT, ITA No.1500/Del/2011 dated 05.07.2013, ITAT, Delhi Bench.

8. Upon careful consideration, we note that ITAT in the case of Planet Advertising Pvt. Ltd. vs. ACIT (supra) adjudicated the identical issue as under :-

“ Ld. Counsel of the assessee submitted that issue involved is squarely covered in favour of the assessee by the following decisions.

6. (I) ACIT V. Real Image Media Technologies (P) Ltd. 114 ITD 573 (Mad.) (II) CIT V. Noble & Hewitt India Pvt. Ltd. 166 Taxman 48 (DELHI).

7. Ld. Departmental representative on the other hand could not rebut the submissions of the Ld. Counsel of the assessee.

8. We have carefully considered the submissions. We find that in the case of ACIT V. Real Image Media Technologies Pvt. Ltd. (Supra) the tribunal had as under :-

“(1) S. 43B starts with the non-obstante clause and specifies that the education “otherwise allowable” under the Act shall not be allowed unless it is actually paid. The rigour of S. 43B might be applicable to excise or sales tax, but the same could not be applicable in the case of service tax due to two reasons.

(i) The assessee merely acts as an agent of the Government in collection of service tax, and is not entitled to claim deduction on account of service tax.

(ii) S. 43B (c) uses the expression “any sum payable”. For making any disallowance, it has to be established that such sum is payable. A reading of Rule 6 of the Service Tax Rules states that the liability to pay such service tax arises on receipt of payments towards the value of taxable service. If there is no liability to make the payment to the Government, because of non-receipt of payments from the receiver of services, then it cannot be said that such service tax had become payable in terms of S. 43B(a).

(2) 145 A includes sales tax, excise duty, etc. in the turnover of purchases and sales of goods, but it does not apply to services and hence service tax cannot be included in the turnover.

(3) In the given case, the assessee had not preferred a claim for the amount of service tax. Further, there was no liability on the assessee to make payments to the credit of Central Government because of non-receipt of payments from the receiver of services. Therefore, the rigor of S. 43 B is not attached and the CIT (A) was right in deleting the additions made on account of disallowance u/s 43B.”

9. We further find that in the case of CIT Vs. Noble and Hewitt India Pvt. Ltd. (Supra) Hon’ble Delhi High Court has held as under :-

“In our opinion since the assessee did not debit the amount to the Profit & Loss Account as an expenditure nor did the assessee claim any deduction in respect of the amount and considering that the assessee is following the mercantile system of accounting, the question of disallowing the deduction not claimed would not arise.

Ld. Counsel for the revenue submits that the assessee has sought to evade tax under the mercantile system of accounting. We are of the view that it is not for the revenue authorities to tell the assessee how to maintain its accounts.

We cannot find any fault in the view taken by the Tribunal and find no merit in this appeal.”

10. From the above case lodge it is clearly evident that provisions of section 43B are not applicable to the service tax liability. Accordingly, respectfully following the decisions as above the set aside orders of authorities below, and decide the issue in favour of assessee.”

9. Considering the above, we find that the above said issue is squarely covered. The amount of service tax has not been routed through P&L account. Hence, ratio of the above said decision that the provisions of section 43B are not applicable to the service tax liability, is applicable. Accordingly, we uphold the order of the Id. CIT (A).

10. In the result, the appeal filed by the Revenue stands dismissed.

Order pronounced in the open court on this 14th day of December, 2022.

**Sd/-
(CHANDRA MOHAN GARG)
JUDICIAL MEMBER**

**sd/-
(SHAMIM YAHYA)
ACCOUNTANT MEMBER**

**Dated the 14th day of December, 2022
TS**

Copy forwarded to:

- 1.Appellant
- 2.Respondent
- 3.CIT
- 4.CIT(A)-14, New Delhi.
- 5.CIT(ITAT), New Delhi.

AR, ITAT
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