

*IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA BENCH "B" KOLKATA*

Before **Shri Waseem Ahmed, Accountant Member** and
Shri K.Narsimha Chary, Judicial Member

ITA No.2065/Kol/2013 & ITA No.2122/Kol/2014 Assessment Year:2008-09
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Selvel Advertising Pvt. Ltd. C/o M.L. Sahgal & Co. Neelam Apartments, 3 rd Floor, Flat 3E, 61-B, Park Street, Kolkata-700 016 [PAN No.AAECS 8398 C]	बनाम / V/s.	Commissioner of Income Tax, P-7, Chowringhee Square, Kolkata-700 016
DCIT, Circle-12(2), P-7, Chowringhee Square, Aayakar Bhawan, 7h Floor, Kolkata-700 069	बनाम / V/s.	M/s Selvel Advertising Pvt. Ltd., 10/1B, Diamond Harbour Road, Kolkata-700 027
अपीलार्थी /Appellant	..	प्रत्यर्थी /Respondent

आवेदक की ओर से/By Assessee	Shri J.P. Khaitan, Advocate & Shri Tarun Kumar Banerjee, AR
राजस्व की ओर से/By Respondent	Shri Niraj Kumar, CIT-DR & Shri Alope Nag, Addl. CIT-DR
सुनवाई की तारीख/Date of Hearing	23-08-2016
घोषणा की तारीख/Date of Pronouncement	30-09-2016

आदेश /O R D E R

PER Waseem Ahmed, Accountant Member:-

These two appeals – assessee has been filed relating to Assessment Year (AY) 2008-09 passed by Commissioner of Income Tax IV, Kolkata under the provision of Sec. 263 of the Income Tax Act, 1961 (hereinafter referred to as ‘the Act’) vide Memo. No. CIT, Kol-IV/Kol/263/2012-13/391-393 dated 28.03.2011/01.05.2013.

Other Revenue's appeal against the order of Commissioner of Income Tax (Appeals)-XII, Kolkata dated 08.09.2014. Assessment was framed by Addl. CIT, Range-12, Kolkata u/s 143(3) for AY 2008-09 vide his order dated 21.12.2010.

Both the appeals are heard together and are being disposed of by way of a consolidated order.

Shri J.P. Khitan, & Sri Tarun Kumar Banerjee, Ld. Advocates appeared on behalf of assessee and Sri Niraj Kumar & Shri Alope Nag , Ld. Departmental Representatives appeared on behalf of Revenue.

First we take up assessee's appeal in ITA No. 2065/Kol/2013 for A.Y. 08-09.

2. Facts in brief as culled out from the order of lower authorities and other relevant documents are that assessee in the present case, a Private Limited Company and engaged in the business of advertising. Assessee for the year under consideration filed its return of income on 30.09.2008 declaring total income of Rs.1,93,10,736/-. Thereafter case was selected for scrutiny and notice u/s 143(2) of the Act issued. The assessment was framed u/s. 143(3) of the Act at a total income of Rs.3,5182,500/- by making certain additions / disallowances vide order dated 21.12.2010.

3. Sole issue raised by assessee in this appeal is that Ld. CIT erred in treating the order passed by Assessing Officer as erroneous in so far as prejudicial to the interest of Revenue u/s 263 of the Act.

4. The impugned order passed by Ld. CIT u/s 263 of the Act by observing certain defects in the assessment order passed by AO u/s. 143(3) of the Act. As per Ld. CIT, the following facts have not been considered by AO while framing the assessment u/s. 143(3) of the Act:-

1) There was service tax outstanding till 30.09.2008 for an amount of Rs.1,37,15,804/- which needs to be disallowed as per the provision of Sec. 43B of the Act;

2) The assessee in its financial statement has shown the life of hoarding structures over a period of 3-5 years as per its accounting policy on item No.

1.4. Accordingly, the depreciation was to be provided in the books of account depending upon the estimated useful life of the hoarding structure. However, Ld. CIT observed that the assessee has claimed depreciation @ 100% on hoarding structures amounting to Rs.1,05,24,933/- which is against the provision of law. Accordingly, Ld. CIT further observed that the hoarding structures are not purely temporary structures and therefore the depreciation should be allowed on this structures @ 10% per annum like non residential buildings. Therefore, the excess depreciation to the tune of Rs.1,31,90,323/- [14191130 – (10% of 58,25,005 + 50% of 10%) 83,66,125/-] was allowed in the assessment order framed u/s.1 43(3) of the Act.

In view of the above, notice was issued to the assessee u/s 263 of the Act for seeking the explanation why the order of AO should not be held as erroneous and prejudicial to the interest of Revenue. In compliance to the notice, assessee submitted that as under:-

a) Non-payment of service tax amounting to Rs.1,37,15,804/-, the assessee submitted that as per the Sec.145A of the Act the turnover includes sales tax, excise duty but it does not include the service tax. The assessee is a service provider and merely acting as agent of the Govt. for the collection and payment of service tax to Government. The assessee is not entitled to claim deduction on account of service tax. The assessee also submitted that the liability to make the payment of service tax arise when the service provider has received the payment as such there is no liability to make the payment to the account of Central Govt. until and unless the payment is received from the party concerned as per the Rule-6 of Service Tax Rules, 1994. The assessee also submitted that there was no debit in the profit and loss a/c of assessee and no credit in the profit and loss a/c of assessee on account of service liability. Therefore, there was no mistake in the assessment order and no addition is required to be made.

b) Regarding depreciation, the assessee submitted that necessary details with regard to depreciation claimed on the temporary structures had been furnished at the time of assessment proceedings. It was submitted that 100% depreciation was allowed in the course of first assessment year of assessee i.e., AY 1972-73 and thereafter. No disallowance of depreciation was ever made by the AO in the assessment proceedings. The assessee further submitted that the useful life of the hoarding structures were determined on the basis of technical certificate given by the Chartered Engineers. But it has nothing to do with the provisions specified under the Income Tax Act. The assessee is entitled to claim the depreciation under the IT Act in spite of the fact that no depreciation was charged by the assessee in its books of account.

However, the Ld. CIT(A) has rejected the plea of assessee by observing that the payment of service tax is governed by the provision of Sec. 43B of the Act and therefore it is not allowed while framing the assessment u/s. 143(3) of the Act. Similarly, Ld. CIT observed that 100% depreciation has been allowed on the basis of order passed for AY 1972-73 and also subsequent AYs also. But the Ld. CIT further observed that there was a huge difference in the technology and life of hoarding structure. Therefore, the assessment order passed in AY 1972-73 has no bearing in the instant case. Accordingly, Ld. CIT held the order of AO is erroneous and prejudicial to the interest of revenue and he directed the AO to look into the matter afresh and pass necessary order as per law.

Aggrieved, assessee preferred an appeal before us.

5. Before us Ld. AR filed two sets of paper book – one which is running pages from 1 to 70 and supplementary paper book which is running pages 1 to 108 pages and stated that the issue of statutory payment of tax liability and other payments according to Sec.43B of the Act has been duly investigated by the AO at the time of assessment proceedings. He in support of assessee's claim drew our attention to the query raised by the AO u/s. 142(1) of the Act at the time of assessment which is

placed on page 49 of item No 18 of the paper book. Ld. AR also drew our attention on page 51 of the paper book where the reply for the statutory payments of tax liability according to Sec. 43B of the Act was placed. Ld. AR of the assessee accordingly submitted that the matter of the service tax liability has been duly investigated by the AO at the time of assessment proceedings and therefore on this ground the order of AO cannot be held as erroneous and prejudicial to the interest of revenue. Ld. AR of assessee also drew our attention on page 7 of the supplementary paper book where the necessary details for the payment according to Sec. 43B of the Act were furnished in the form of tax audit report. Further, Ld. AR submitted that the service tax has not been shown as income in the profit and loss a/c and similarly no expenses with regard to service tax has been claimed in the profit and loss a/c of assessee. Ld. AR in support of assessee's claim has drawn our attention on pages 46 of the supplementary paper book where the profit and loss a/c of assessee was placed. Ld. AR in support of assessee's claim also relied in the case of *CIT vs. Noble And Hewitt (I) P. Ltd.* (2008) 305 ITR 324 (Del), where the Hon'ble court held:-

“The assessee maintained its accounts on the mercantile system of accounting. It had collected service tax during the previous year relevant to the assessment year 1999-2000. Out of the service tax so collected, it had deposited part of the amount but an amount of Rs.14.40 lakhs was not deposited by it with the concerned authorities. The assessee did not claim any deduction in this regard nor did it debit the amount as an expenditure in the profit and loss account. The Assessing Officer as well as the Commissioner (Appeals) nevertheless disallowed the amount and added it back to the income of the assessee. The Tribunal set aside the order. On appeal to the High Court:

‘Held, dismissing the appeal, that since the assessee did not debit the amount to the profit and loss account as an expenditure nor claim any deduction in respect of the amount and considering that the assessee was following the mercantile system of accounting, the question of disallowing the deduction not claimed would not arise.’

Further, Ld. AR of assessee with regard to depreciation on hoarding structures submitted that Assessing Officer has raised specific query for the depreciation claimed on the hoarding structures. The query raised by the AO at the time of assessment is placed on page 53 of the paper book the assessee in response to the query raised by AO has submitted the detailed reply which is placed on page 55 of the Paper Book. He

requested the Bench to allow the assessment order and quash the impugned order passed by Ld. CIT.

On the other hand, Ld. DR with regard to the service tax issue supported the order of the Id. CIT. with regard to depreciation claimed by assessee @ 100% on hoarding structures, it was submitted that the order of AY 1972-73 was passed 40 years back. There must have been changes in the hoarding structures, therefore the facts should be looked afresh while allowing 100% depreciation on the hoarding structures. As per the accounting policy of the assessee, the useful life of hoarding structure has been determined over a period of 3-5 years. Ld. Finally the Id. DR vehemently supported the order passed by Ld. CIT u/s. 263 of the Act.

6. We have heard the rival contentions of both the parties and perused the materials available on record. From the foregoing discussion, we find that Ld. CIT has held the order of AO as erroneous in so far as prejudicial to the interest of revenue on account of two reasons *Firstly* service tax amount has not been paid on or before filing the IT return as mandated under the provision of Sec. 43B of the Act. *Secondly*, the AO at the time of assessment has allowed the depreciation @ 100% on the hoarding structure. Now the question before us arise whether the impugned order passed by Id CIT u/s 263 of the Act is erroneous and prejudicial to the interest of revenue in the aforesaid facts and circumstances of the case. As per the Service Tax Law, Service Tax is payable as and when the payment /fees for underlying service provided are realized. As the appellant firm has not received the sum till the end of the financial year i.e. 2007-08, the question of paying the same did not arise at all. As already stated the fact of non-realization of fees is disputed by the AO in his order. If for any reason the payment for services rendered is not realized (bad debts), there was no liability as to payment of service tax. Thus service tax law stands on a different footing as compared to other laws like Central Excise or VAT. As per the provisions of section 145A of the Income-tax Act 1961, taxes and duties should form part of the Gross Receipts but its application is restricted to purchase and sale of goods only, and does not extend to service contracts. Thus, the liability of the service tax does not

also arise as per section 145A of the Act. The provisions of section 145A of the Income-tax Act 1961 that read as under:-

“Notwithstanding anything to the contrary contained in Section 145, (a)The valuation of purchase and sale of goods’) and inventory for the purposes of determining the income chargeable under the head “Profits and gains of business for profession” shall be-
(i) in accordance with the method of accounting regularly employed by the assessee; and
(ii) further adjusted to include the amount of any tax, duty, cess or fee (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.”

It is clear from the above provisions that it applies only in respect of valuation of purchase and sale of goods and inventory and not to service contracts. Therefore the action of the Assessing Officer in invoking provisions of section 145A of the Act and adding Service Tax to Gross Receipts is incorrect in as much as against the very basic principles of section 145A.

Apart from the above, we find that the payment for services rendered was not received in the financial year under consideration. The provisions of Section 43B of the Act reads as under:-

“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
(b).....”

Reading of this section makes it clear that any deduction claimed of any amount paid by way of any tax, duty, cess, etc. will be allowed only if the said sum is paid. In the present case the liability to pay service tax itself has not, crystallized owing to non receipt of payment. Thus, the question of claiming deduction of such tax does not arise. The Chennai Bench of ITAT in the case of Assistant Commissioner of Income-tax, Media Circle-II, Chennai v. Real Image Media Technologies (P) Ltd. [2008] 114 ITD 573 (CHENNAI) had an occasion to examine identical case it was held that, the rigor of the provision of section 43B would be attracted only to a case where an item

is allowable as deduction but because of the failure to make payment, such deduction would not be allowed. The rigor of section 43B might be applicable to the 'case of sales-tax or excise duty but the same could not 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 Government and is paid to the Government account, accordingly. Therefore, a service provider is merely acting as an agent of the Government, and is not entitled to claim deduction on account of service tax. Hence on this account alone addition under section 43B could not have been made. Secondly, section 43B(a) uses the express on 'any sum payable'. For making any disallowance, first of all it has to be established that such sum is payable. The word 'payable' used in section 43B means that there is a kind of obligation on the part of payee to make the payment which is already due. A plain reading of rule 6 of the Service Tax Rules would show that service provider becomes liable to make the payment of service tax by the 5th of the month immediately following the calendar month in which the payments are received towards the value of taxable service. The first proviso provides for an exception in case of individuals or proprietary firms or partnership firms, and in such cases, service tax has to be paid to the credit of the Central Government by the 5th of the month immediately following the quarter of calendar year in which the payments are received. The only difference is that in case of individual or proprietary or partnership firm, payment has to be made on 5th of the following month after the following quarter of calendar year whereas in the case of other organizations it has to be paid on the 5th of the month immediately following the calendar month. But in both the cases, the liability arises to make the payment only after the service provider has received the payments. If there is no liability to make the payment to the credit of the Central Government because of non-receipt of payments from the receiver of the services, then it cannot be said that such service tax has become payable in terms of clause. In this connection, we also relied in the judgment of Hon'ble Delhi High Court in the case of *Noble And Hewitt (i) P. Ltd.* (supra).

Similarly for the issue raised for the depreciation claimed @ 100% on the hoarding structure, we find that the hoarding structures are temporary in nature and they cannot be equated with the building for the reason that the temporary structures are raised in temporary location which are taken on lease – once the structures are removed the value becomes almost nil and cannot be used again. In this connection, we also rely the order of co-ordinate Bench of this Tribunal in “B” in **ITA No.657 to 659/Kol/2011** for AY 06-07 to 08-09 dated 01.01.2015, the relevant operative portion of the said order is reproduced below:-

“... .. From arguments of both the sides and considering the appellate order, we are of the view that the LED Video Display Boards are temporary structures and they cannot be equated with plant and machinery for the reason that these structures are displayed outside in temporary locations and on land taken on lease for a temporary period. Once you dismantle these temporary structures, it will reduce its value to almost nil and it cannot be used second time or third time and life span of LED Vide Display Boards is also not more than 6 months to 1 year. The land is neither owned by the assessee nor it is held by assessee on lease basis. The structures put on such and, whatever in nature, are purely temporary structures. Even sometimes, these structures are not taken by the assessee for re-use again. When such structures re put on land not belonging to assessee, the expenditure is held to be the nature of revenue in view of the judgment of Hon'ble Supreme Court in the case of CIT Vs. Madras Auto Service P t. Ltd. (1998) 233 ITR 468 (SC). In view of the above, we confirm the order of CIT(A) and this issue of revenue's appeal is dismissed.”

Respectfully following the precedents, as above, we hold that the impugned revision order is unsustainable in law and we, therefore, cancel the same. This ground of assessee's appeal is allowed.

7. In the result, assessee's appeal is allowed.

Coming to Revenue's appeal in ITA No.2122/Kol/2014 for A.Y. 08-09.

8. Revenue has raised following grounds:-

“1. “That in the facts of the case and in the law the Ld. CIT(A) erred by deleting the addition of Rs.1,37,15,804/- Service Tax to the tune of Rs.1,37,15,804/- remaining unpaid till due date of filing of return of income. As the assessee had received/realized Service Tax to the tune of Rs.1,37,15,804/- during the year but failed discharge the liability to make payment of such Service Tax before the due date of filing of return of income.”

2. “That in the facts of the case and in the Ld. CIT(A) erred by deleting the addition of excess depreciation claimed of Rs.1,31,90,324/- without

appreciating that the benefit enjoying by the assessee is of enduring nature over a period of time.”

9. At the outset we find that both the common issues raised by the Revenue are allowed in favour of the assessee in paragraph no. 6 of this order in ITA No. 2065/Kol/2013. Following the same, we dismiss both the issue raise by Revenue in its' appeal

10. In the result, assessee's appeal stands allowed and that of Revenue is dismissed.

Order pronounced in open court on 30/09/2016

Sd/-
(K.Narsimha Chary)
Judicial Member

Sd/-
(Waseem Ahmed)
Accountant Member

*Dkp

दिनांक:- 30/09/2016 कोलकाता / Kolkata

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

1. आवेदक/Assessee-Selvel Advertising Pvt. Ltd. C/o M.L. Sahgal & Co., Neelam Apartments, 3rd Floor, Flat 3E, 61-B, park Street, Kolkata-16
2. राजस्व/Revenue-CIT, Kol-IV, P-7, Chowringhee Squire,/DCIT, Circle-12(2), 7th Floor, P-7, Chowringhee Sq., Kolkata-69
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त- अपील / CIT (A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण कोलकाता / DR, ITAT, Kolkata
6. गार्ड फाइल / Guard file.

/True Copy/

By order/आदेश से,

उप/सहायक पंजीकार
आयकर अपीलीय अधिकरण,
कोलकाता