

IN THE INCOME TAX APPELLATE TRIBUNAL
“SMC - A” BENCH : BANGALORE

BEFORE SHRI VIJAY PAL RAO, JUDICIAL MEMBER

ITA No. 1840/Bang/2016
Assessment year : 2010-11

Shri P.V. Basavaraja, (Prop: M/s. Ripple Media), No. 244, 8 th Main, 6 th Cross, 2 nd Block, Jayanagar, Bangalore – 560 011. PAN: AIXPB 3049F	Vs.	The Income Tax Officer, Ward – 4(2), Bangalore.
APPELLANT		RESPONDENT

Appellant by	:	Shri C.R.V. Gupta, Advocate
Respondent by	:	Shri AR.V. Sreenivasan, JCIT (DR)

Date of hearing	:	22.03.2017
Date of Pronouncement	:	31.03.2017

ORDER

Per Vijay Pal Rao, Judicial Member

This appeal by the assessee is directed against the order dated 11.08.2016 of CIT(A) for the assessment year 2010-11. The assessee has raised the following grounds:

GROUNDS OF APPEAL

01. The Order of the Learned CIT (A) – 7, in so far as it is against the appellant, is opposed to law, equity, weight of evidence, relevant provisions & laws of the land including the Income Tax Act, 1961 and the Service Tax notifications relevant to Finance Act, probabilities, facts and circumstance of the case.
02. The Learned CIT (A) – 7 is not justified in assessing the income from Business of Rs.17,76,573/- by rejecting the income reported by the appellant.
03. The Learned CIT (A) – 7 is not justified and erred in while adding Service Tax of Rs.15,98,695/- by ignoring the Service Tax Rules relevant to the Finance Act, 2009 Act by not appreciating the facts and circumstances of the case.

04. The Learned CIT (A) – 7 is not justified and erred in while adding as un-explained Sundry Creditors of Rs.2,04,447/- by ignoring and not appreciating the facts and circumstances of the case.

05. The Learned CIT (A) – 7 is not justified and erred in while adding difference in bank account of Rs.50,685/- by ignoring and not appreciating the facts and circumstances of the case.

06. For the above and other grounds that may be urged at the time of hearing the appeal, the Appellant humbly prays that the appeal may be allowed and justice rendered.

2. At the time of hearing, the Id. counsel for the assessee has stated at bar that the assessee does not press ground nos. 4 and 5 and the same may be dismissed as not pressed. The Id. DR has raised no objection if these grounds are dismissed as not pressed. Accordingly, ground nos. 4 and 5 of the assessee's appeal are dismissed being not pressed.
3. Ground nos. 1, 2 and 3 are regarding disallowance of service tax of Rs. 15,98,695/- u/s. 43B of the Act. During the assessment proceedings the AO found that the assessee has credited a liability of Rs. 15,98,695/- as unpaid service tax. Since the said amount was not paid on or before filing of the return u/s. 139(1) of the Act the same was added to the total

income of the assessee as per the provisions of section 43B of the Act. The assessee challenged the action of the AO before the CIT(A) and contented that as per the provisions of service tax Act the service tax was required to be paid as and when service tax is collected. Since this amount of Rs. 15,98,695/- was not yet collected as on the date of balance sheet on 31.03.2010 from the customers therefore, the same is not at all due for payment as per the provisions of Service Tax Act and consequently the provisions of section 43B of IT Act are not applicable. The assessee contented before the CIT(A) that there is an option available to the assessee to pay service tax on due basis for a window period of three months which was available till 30.06.2010. The assessee also relied upon Rule 6 of Service Tax Rules and submitted that the service tax liability arises only when the payments are received towards the value of taxable services. The CIT(A) did not accept the contention of the assessee and confirmed the disallowance made by the AO.

4. Before the Tribunal, the ld. AR of the assessee has submitted that the CIT(A) has relied upon the amended provisions of Rule 6 of Service Tax Rules which are applicable only w.e.f. 01.04.2012 and not for the assessment year under consideration. He has referred to the existing provisions of Rule 6 of Service Tax Rules and submitted that the service

tax shall be paid to the government by the 5th of the month immediately following the calendar month in which the payments are received towards the value of the taxable services. Thus, the Id. AR has contented that this amount was not received by the assessee till 31.03.2010 then there was no liability either accrued or arose to pay the service tax to the government. He has further contented that the assessee has not claimed any deduction of the service tax in question in the Profit and Loss account and it was shown only an outstanding liability in the balance sheet. Therefore no disallowance u/s. 43B is called for. In support of his contention he has relied upon the decision dated 12.03.2010 of the coordinate bench of the Tribunal in the case of DCIT Vs M/s. Adecco Peopleone India Ltd. in ITA No. 613(BNG)/09.

5. On the other hand, the Id. DR has submitted that the assessee has adopted the modus-operandi to circumvent the provisions of section 43B by not showing the service tax amount in question as part of the sales as well as the expenditure in the Profit and Loss account. Thus, the Id. DR has submitted that this mode of treatment by the assessee is not permissible which is nothing but to circumvent the provisions of the Act. He has further contented that even when three months window period is taken into consideration this amount shown as outstanding liability was already

became due for payment to the government and the assessee was required to pay the same before the due date of filing of return of income. Since the assessee failed to pay the said amount before the said date, the provisions of section 43B are attracted. It was submitted that the assessee cannot be permitted to misuse the provisions of the Act by avoiding the disallowance for the year under consideration and then availing the deduction u/s. 43B in the subsequent year when this amount is actually paid by the assessee. The ld. DR has relied upon the orders of the authorities below.

6. I have considered the rival submissions as well as relevant material on record. In this case, the assessee has shown this amount of Rs. 15,98,695/- as outstanding service tax liability as on 31.03.2010. The assessee has contented that since this amount was not became due for payment as the assessee was yet to receive this amount from the clients then the provisions of section 43B cannot be invoked. The ld. AR has forcefully contented that the assessee's role is only a collector of tax on behalf of the government and it is not the liability of the assessee. Thus, the ld. AR has contented that when the assessee has not claimed this amount as an allowable expenditure then it cannot be disallowed. It is pertinent to note that the provisions of section 43B itself is not

determining the allowability of the particular expenditure but it only puts a restriction on the claim of deduction in respect of certain deductions otherwise allowable under the Act that the same are allowed only on actual payment. Therefore section 43B is only an exception to the rule of accrual and mercantile system of accounting for claiming the deduction of certain expenses. There is no quarrel that the service tax payable by the assessee is an allowable deduction as per the provisions of this Act but since this falls in the category of tax, duty, cess under the law therefore, this deduction is allowable only on actual payment. Thus the provisions of section 43B are attracted only when a particular deduction is otherwise allowable under the provisions of the IT Act, even if the same are not paid but has accrued. The assessee in this case has shown the sales net of the service tax payable but not paid and correspondingly has not claimed this amount of unpaid service tax in the Profit and Loss account by adopting this method of preparing of Profit and Loss account. The assessee can very well circumvent the provisions of section 43B even if the assessee does not pay this amount of service tax at all in the subsequent years. Further, the revenue is effected in the case when the assessee is not showing this unpaid service tax in the sales as well as a deduction in the Profit and Loss account but claims the deduction in the subsequent year when it is actually paid. Thus the only point which is

effecting the revenue is that without claiming the deduction in this year and showing the sale net of this unpaid service tax if the assessee claims the deduction of this amount in the subsequent year then it will be a misuse of provisions of law which is not permissible. The assessee has relied upon the decision of the coordinate bench in case of DCIT Vs M/s. Adecco Peopleone India Ltd. (supra) wherein the Tribunal has observed that the assessee did not claim the unpaid service tax as expenditure and therefore the same cannot be disallowed u/s. 43B. However the Tribunal has not gone into the aspect that when the assessee has adopted the modus-operandi of not showing this amount on the both side of Profit and Loss account and in case if assessee claims the deduction in the subsequent year then it would be a case of impermissible deduction by misusing the provisions of law. Accordingly, the said decision of the Tribunal will not help the case of the assessee.

7. In view of the above facts and circumstances of the case, it is held that so far as this amount is not taken to the Profit and Loss account either in the sales or in the debit side it is revenue neutral however, in such a case the assessee is not permitted to claim the deduction of this amount in the subsequent year on actual payment by invoking the provisions of section

43B. Accordingly the AO is directed to ensure that this amount is not allowed as a deduction in the subsequent years on actual payment.

8. In the result the appeal of the assessee is partly allowed.

Pronounced in the open court on this 31st day of March, 2017

Sd/-
(VIJAY PAL RAO)
Judicial Member

Bangalore,
Dated, the 31st March, 2017.

/MS/

Copy to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT, Bangalore.
6. Guard file

By order

Assistant Registrar,
ITAT, Bangalore.