आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES, JAIPUR

श्री कुल भारत, न्यायिक सदस्य एवं श्री विक्रम सिंह यादव, लेखा सदस्य के समक्ष
BEFORE: SHRI KUL BHARAT, JM & SHRI VIKRAM SINGH YADAV, AM

आयकर अपील सं./ITA No. 825/JP/2013
निर्धारण वर्ष/Assessment Year : 2009-10

Shri Fareed Anwar L-14, Krishna Marg, C-Scheme, Jaipur.	बनाम Vs.	The ITO, Ward 6(3), Jaipur.
स्थायी लेखा सं./जीआईआर सं./PAN No.: ADBPA1318F		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

निर्धारिती की ओर से/Assessee by : Shri Rajeev Sogani (CA)
राजस्व की ओर से/Revenue by : Shri Ajay Malik (Addl.CIT)

सुनवाई की तारीख/Date of Hearing : 09/05/2017
घोषणा की तारीख/Date of Pronouncement: 24/05/2017.

आदेश/ORDER

PER SHRI VIKRAM SINGH YADAV, A.M.

This is an appeal filed by the assessee against the order of Ld. CIT(A)-II, Jaipur dated 30.08.2013 wherein the assessee has taken following two grounds of appeal:

"1. In the facts and circumstances of the case and in law the ld. CIT(A) has erred in confirming the action of ld. AO in disallowing u/s 40(a)(ia) of the Income Tax Act, 1961 the following amounts:

Particulars	*Amount*
Hire Charges	*10,95,012/-*
Labour and Job Charges	*10,36,155/-*
Advertisement	*44,500/-*

Freight	*33,600/-*
Total	*22,09,267/-*

The action of the ld. CIT(A) is illegal, unjustified, arbitrary and against the facts of the case. Relief may please be granted by quashing the said disallowances of Rs. 22,09,267/- u/s 40(a)(ia).

2. In the facts and circumstances of the case and in law the ld. CIT(A) has erred in confirming the action of ld. AO in disallowing a sum of Rs. 7,67,899/- u/s 43B of the Income Tax Act, 1961. The action of the ld. CIT(A) is illegal, unjustified, arbitrary and against the facts of the case. relief may please be granted by quashing the said disallowance of Rs. 7,67,899/- u/s 43B."

2. Regarding ground No. 1, briefly the facts of the case are that the AO disallowed expenses incurred by the assessee under various heads u/s 40(a)(ia)of the Act amounting to Rs. 22,09,267/- on account of non deduction of TDS. During the appellate proceeding, the assessee took the plea that the provisions of Section40(a)(ia)are applicable only to the expenditure which is payable as on the balance sheet and hence cannot be applied on the expenditure which has already been paid during the year. However, the contention of the assessee were not accepted and hence, the present appeal before us.

3. The subject matter is no more *rest intergra.* The Hon'ble Supreme Court decision in its recent decision in case of M/s Palam Gas Service (Civil Appeal No. 5512 of 2017) dated 03.05.2017 has held that Section 40(a)(ia) covers not only those cases where the amount is payable but also those cases where the amount has been paid during the financial year without

deduction of TDS. The relevant finding are contained in para 15 of its order which are reproduced as under:-

" *We approve the aforesaid view as well. As a fortiorari, it follows that Section 40(a)(ia) covers not only those cases where the amount is payable but also when it is paid. In this behalf, one has to keep in mind the purpose with which Section 40 was enacted and that has already been noted above. We have also to keep in mind the provisions of Sections 194C and 200. Once it is found that the aforesaid Section mandate a person to deduct tax at source not only on the amounts payable but also when the sums are actually paid to the contractor, any person who does not adhere to this statutory obligation has to suffer the consequences which are stipulated in the Act itself. Certain consequences of failure to deduct tax at source from the payments made, where tax was to be deducted at source or failure to pay the same to the credit of the Central Government, are stipulated in Section 201of the Act. This Section provides that in that contingency, such a person would be deemed to be an assessee in default in respect of such tax. While stipulating this consequence, Section 201 categorically states that the aforesaid Sections would be without prejudice to any other consequences which that defaulter may incur. Other consequences are provided under Section 40(a)(ia) of the Act, namely payments made by such a person to a contractor shall not be treated as deductible expenditure. When read in this context, it is clear that Section 40(a)(ia) deals with the nature of default and the consequences thereof. Default is relatable to chapter XVIIB (in the instant case Sections 194C and 200, which provisions are in the aforesaid Chapter). When the entire scheme of obligation to deduct the tax at source and paying it over to the Central Government is read holistically, it cannot be held that the word 'payable' occurring in Section 40(a)(ia) refers to only those cases where the amount is yet to be paid and does not cover the cases where the amount is actually paid. If the provisions is interpreted in the manner suggested by the appellant herein, then even when it is found that a person, like the appellant, has violated the provisions of Chapter XVIIB (or specifically Section 194C and 200 in the instant case), he would still go scot free, without suffering the consequences of such monetary default in spite of specific provisions laying down these consequences."*

4. Now coming to another contention raised by the AR that the amendment brought-in in section 40(a)(ia) by the Finance Act 2014 where it is provided that 30 percent of any sum payable to a resident shall be disallowed as against 100% disallowance made earlier should be applied in the instant case and disallowance restricted to 30% of the total amount. On perusal of the Finance Act, 2014, it is noted that the said amendment has been brought in and made effective from 01.04.2015 and there is nothing which suggest such amendment is made effective or to be read as retrospective in nature. In view of the clear wordings as enacted by the legislature, the same cannot be held applicable to the assessee for the year under consideration. Regarding the reliance by the ld. AR of the decisions passed by the Coordinate Benches in case of Rajendra Prasad (ITA 895/JP/2012) and subsequent decision in case of Smt. Sonu Khandelwal (ITA No. 597/JP/2013), on perusal of these two decisions, it is noted that though the Coordinate Benches have acknowledged the fact that the said amendment has been brought only w.e.f. 01.04.2015 but at the same time, it was held to be applicable retrospective in those cases without providing any rationale or reasoning to support the retrospective applicability of the said amendment. There is no discussions or justification that we find in the decisions of the Coordinate Benches so as to reconcile the position as stated by the Finance Act to be applicable from 1.4.2015 and as held by the Coordinate Benches. In light of the same, we are unable to follow the said decisions of the Coordinate Benches as canvassed by the ld AR. In the result, ground No. 1 of the assessee is dismissed.

5. Regarding ground no. 2, the fact and finding of the ld. CIT (A) are as under:-

> *"I have considered the facts of the case; assessment order and appellant's written submission. Assessing Officer disallowed unpaid service tax and VAT under section 43B. It is not in dispute that*

appellant did not pay service tax and Vat till the due date of filing return of income. Appellant argued that he has not claimed service tax and Vat in the P&L account and therefore these are not claimed as expenses and accordingly the provisions of section 43B are not applicable in the appellant's case. The argument made by the appellant is not correct in view of the decision of Hon'ble Supreme Court in the case of Chowrangee sales bureau that sales tax is part of the turnover of the assessee. Even if accounts are made on exclusion method, sales tax will be treated as part of turnover and even if sales tax is not debited in the P&L account, it is deemed to have been claimed in exclusion method. Considering this, even if appellant has not included service tax and Vat as part of revenue and not claimed these taxes in P&L account, these are deemed to be included in revenue and deemed to have been claimed in P&L account. Accordingly, if statutory liability is not paid till the due date of filing return of income, the provisions of section 43B is clearly applicable. The decisions relied upon by the appellant for service tax are relating to the situation where service tax liability was not due. In the case of appellant it is not so. Both the taxes were due however not paid till the due date of filing return. Therefore the decisions relied upon by the appellant are not applicable particularly in view of the decision of apex court referred earlier. Accordingly the disallowance made by the assessing officer under section 43B is confirmed."

6. In this regard the ld. AR submitted as under:-

"3.1 It is undisputed that assessee did not claim Service Tax and VAT payable as expenditure in his Profit and Loss Account.

3.2 Since no deduction is claimed of the Vat payable and Service Tax by the assessee for the relevant previous year, provisions of section 43B are not applicable.

3.3 Under similar set of facts, Noble & Hewitt (I)(P.) Ltd. [2008] Taxman 48 (Delhi-HC) (Case law page-39-40) collected service tax during the relevant previous year. Out of the service tax so collected it did not deposit part of the

service tax amount with the concerned authorities. However, the company did not claim any deduction in this regard nor did it debit the amount as an expenditure in the Profit and Loss Account. Departmental Authorities relaying on the case of Chowinghee Sales Bureau (P.) Ltd. (Supra) disallowed the amount and added it back to the income of the company. Hon'ble Delhi High Court under such circumstances held that

"We are unable to agree. In that case it was held that the liability to pay sales tax arose the moment a sale or purchase was effected and if an assessee was maintaining accounts on the mercantile system it would be entitled to deduction of the estimated liability of sales tax, even though such sales tax had not been paid to the sales tax authorities. The question there concerned was the entitlement of the assessee to deduction under section 10(1) and 10(2) (xv) of the Indian Income-tax Act, 1922. The decision is clearly distinguishable in its application to the present case. here we are concerned with an assessee who has not even claimed any deduction on the ground of service tax and has not debited the amount to its Profit and Loss Account. Moreover the provisions of section 43B of the Act are quite clear in this regard. The decision of the Calcutta High Court in Chowringhee Sales Bereau (P.) Ltd.'s case (supra) was not in the context of the applicability of section 43B of the Act.."

3.4 Hon'ble Delhi High Court in the case of Jet lite (Indian) Ltd. [2015] 63 taxmann.com 62 (Delhi) case law page -41 to 61) vide its order dated 04.11.2015, on the issue of addition of the air travel tax under section 43B by the AO held that

" The ITAT followed its order dated 8th August 2008 in ITA No. 294/Luc/2000 which held that section 43B is only attracted when the Assessee claims deduction for any sun payable by way of tax or duty under nay law for the time being in force, and, where, as in the case of the Assessee, no charge is

claimed or made to the profit or loss account, there was no question of disallowing the amount taken to the balance sheet on the liabilities side or of :"adding Back" and deleted the addition. Consequently, the Court upholds the order of the ITAT which affirmed the order by the CIT(A) deleting the above addition. The issue is decided in favour of the assessee and against the Revenue."

3.5 Further, Hon'ble Calcutta High Court in the case of A.W. Figgis & Co. Ltd. [2003] 127 taxman 130 (Calcutta) (case law page-62 to 68) adjudicating an identical issue held that

"Therefore, from a careful perusal of the provisions made in section 43B it can be said that section 43B can be applied on when the tax or duty has been claimed an expenditure but the same tax had not been paid. In our view, in the present case admittedly the assessee did not claim any amount by way of sales tax as a deduction and, therefore, the question of disallowing any such tax or duty under section 43B is totally misconceived. Such being the fact in this case we are unable to accept the contention of Mr. Dev that in view of Explanation 2 of second proviso to section 43B, the question of disallowing any such tax or duty under section 43B cannot at all be accepted.."

3.6 It is pertinent to note that the assessee did not receive the amount on which service tax was payable from the parties to whom services were rendered and thus, the provisions of section 43B were not attracted.

3.7 Hon'ble ITAT Chennai Bench in the case of Real Image Media Technologies (P.) Ltd. [2008] 114 ITD 573 (Chennai) on the issue of Service Tax getting covered by the provisions of section 43B was of the view that the rigours 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 the following two reasons:-

(i) 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.

(ii) Section 43B(c) uses the expression '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 payment 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 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. Thus, 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 (a) of section 43B because that clause specifically mentions 'sum payable by the assessee'.

3.8. It is pertinent to note that the point of Taxation Rules from F.Y. 11-12 have been changed from cash towards accrual basis. In other words the remittance of service tax to government's account by the person liable to pay service tax need not depend on whether he has actually received the payment for services provided, but must depend upon the date of completion of provision of service or at best date of issue of invoke since on that date the payment accrues to him. However, for the relevant A.Y. 2009-10 (F.Y. 2008-09) the liability to pay the service tax arose only when it was received from the service receiver.

3.9. Hon'ble ITAT Mumbai Bench in the case of Pharma Search [2012] 21 taxmann.com 44 (Mum.) , relying on the decision in the case of Real Image Media Technologies (P.) Ltd. (supra), echoed similar views that Service Tax would be out of the rigors of section 43B.

3.10. Hon'ble Bombay High Court vide its order dated 17.04.2015, in case of Ovira Logistics (P.) Ltd. took cognizance of the above mentioned judgment in the case of Pharma Search (supra) and also the ratio laid down by the Hon'ble Supreme Court in the case of Chwringhee Sales Bureau (P.) Ltd. (supra) held that "Having perused the aforesaid decisions, we are clearly of the view that section 43B does not contemplate liability to pay the service tax before actual receipt of the funds in the account of the assessee. In our view, liability to pay service tax into the treasury will arise only upon the assessee receiving the funds and not otherwise. Accordingly, when services are rendered, the liability to pay the service tax in respect of the consideration payable will arise only upon the receipt of such consideration and not otherwise."

3.11. Hon'ble ITAT Jaipur Bench, under identical set of facts, in the case of Ashok Parnami, ITA No. 777/JP/2013, relied on the ratio laid down by the Hon'ble Delhi High Court in the case of Noble Heitt (I) (P) Ltd. (Supra) and held that

" We have heard the rival contentions of both the parties and perused the material available on the record. The assessee has not debited service tax in P&l account, which has been shown in service tax account separately. The Hon'ble Delhi High Court in case of CIT Vs. Noble Hewitt (I) (P) Ltd. (supra) has beld that the assessee followed mercantile system of accounting and collected service tax. The amount of service tax has not been debited in the P&L account as also not claimed as deduction, therefore, amount could not be disallowed. Further the Hon'ble Bombay High Court in the case of CIT Vs. M/s Calibre Personnel Service Pvt. Ltd. (supra) by considering the Hon'ble Delhi High Court decision in the case of CIT vs. Noble Hewitt (I) (P) Ltd. (supra) wherein both the issues i.e. Section 43B and issue of mercantile system of accounting had also been considered and held that in case of assessee, Section 43B no disallowance can be made. The Hon'ble Supreme court has also dismissed the SLP filed by the department in the case of CIT vs. M/s Calibre Personnel Services Pvt. Ltd. (supra). By respectfully following the decision of both the Hon'ble Courts, We delete the addition confirmed by the ld. CIT (A)".

3.12 Further, Hon'ble Bombay High Court, vide its order dated 16.08.2016, in the case of Knight Frank (India) Pvt. Ltd., ITA 247 of 2014, held that section 145A(a)(ii) applies only to goods and not services. Service-tax billed on rendering of services is not includble as trading receipts. No disallowance u/s 43B can be made for the unpaid service-tax liability which is not claimed as a deduction. It was also held by the Hon'ble Bombay High Court in the above mentioned case that when assessee has not claimed any deduction on

account of service tax payable in order to determine the taxable income, there can be no occasion to invoke section 43B of the Act.

3.13 Hon'ble ITAT Jaipur Bench in the case of SVS Express Services, Jaipur vs. DCIT ITA No. 987/JP/15 has adjudicated the similar issue against assessee. However, the facts of the case are different than that of the assessee's case as explained below:

Facts of SVG Express Services, Jaipur Vs. DCIT:

- Related to A.Y. 2012-13 i.e. F.Y. 2011-12, the year in which point of taxation rules have been changed from cash towards accrual basis.
- The assessee collected the amount of Service tax but not deposited the same with the Government.
- Reliance was placed on the decision of the Hon'ble ITAT Banglore bench in the case of Jain Christopher (2013) CCH 0011, which distinguished the decision of Hon'ble Delhi High Court in the case of CIT vs. Noble and Hewitt (I) P. Ltd. [2008] 305 ITR 324 (Delhi). In Jain Christopher also the amount of Service Tax was realized by the assessee.

Facts of Assessee's Case:

- Related to A.Y. 2009-10 i.e. F.Y. 2008-09, the year in which point of taxation rules were on cash basis only.
- The assessee did not collect the amount of Service tax and as a result of which did not deposit the same with the Government."

7. We have heard the rival contentions and perused the material available on record. The provisions of Section 43B has been invoked in respect of VAT as well as service payable by the assessee at the end of the relevant financial year and not paid before the due date of filing of return of income. Firstly, regarding VAT, the issue is no more *rest intergra* in view of the decision of **Hon'ble Supreme Court in case of Chowringee Sales Bureau.** In

context of section 43B, how the said ruling continues to hold good has been discussed by the **Coordinate Bench in case of SVG Express** (ITA No. 987/JP/15) (where one of us was a party) where it was held as under:

"Unlike the situation prevailing at the time when the Hon'ble Supreme Court delivered its judgement in case of Chowringhee Sales Bureau when there were no clear provisions pari-materia to section 43B of the Act, now given that there are specific provisions in terms of section 43B of the Act, to our mind principle and ratio laid down in case of Chowringhee Sales Bureau continues to hold good except that its rigour has been slightly modified to the extent that the taxes collected can be deposited before the due date of filing of return of income and in case there is a delay, it will be added to the professional receipts of the assessee and will be allowed to claim deduction of the amount in the year of payment."

In light of above, disallowance of VAT payable amounting to Rs 93,750 has rightly been made by the Assessing officer and the same is hereby confirmed and to this extent, we confirm the findings of the ld CIT(A).

8. Now coming to the disallowance regarding to service tax. The ld AR has contended that the assessee has not received the amountfrom the parties to whom the services were rendered and in respect of which service tax was payable and thus the provisions of Section 43B were not attracted. It was further brought to the notice of the Bench that the point of taxation rules have been amended w.e.f. financial year 2011-12 wherein it is provided that the liability to pay the service tax to the Government account is no more dependent upon whether the service provider has actual received the payment for services but is dependent upon the date of completion of services or at best, the date of issue of the invoice since on that date the payment accrues to him. The said amendment is prospective and for the year

under consideration ie, for financial year 2008-09, the liability to pay the service tax arise only when it is actually received by the service provider from the services recipient. It was submitted that in the instant case, the assessee did not receive the amount on which service tax was payable from the parties to whom services were rendered and thus, the provisions of section 43B were not attracted. We prima facie find force in the contentions of the ld AR that where amount on which service tax was payable was not collected, there cannot be a question of collection or deemed collection of service tax and in absence of the same, there cannot be a question of deemed receipt and applicability of section 43B of the Act. However, we find that there is no finding of fact recorded by the lower authorities in this regard to support the said contention of the ld AR that the assessee did not receive the amount on which service tax was payable from the parties to whom services were rendered. We, accordingly, set aside the matter relating to service tax to the file of the Assessing Officer to examine the same afresh after providing reasonable opportunity to the assessee.

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

Order pronounced in the open court on 24/5/2017.

Sd/-	Sd/-
(कुल भारत)	(विक्रम सिंह यादव)
(Kul Bharat)	(Vikram Singh Yadav)
न्यायिक सदस्य/Judicial Member	लेखा सदस्य/Accountant Member

Jaipur
Dated:- 24/05/2017
*Santosh

आदेश की प्रतिलिपि अग्रेषित/Copy of the order forwarded to:

1. अपीलार्थी/The Appellant- Shri Fareed Anwar L-14, Krishna Marg, C-Scheme, Jaipur.

2. प्रत्यर्थी / The Respondent- ITO, Ward 6(3), Jaipur.
3. आयकर आयुक्त / CIT
4. आयकर आयुक्त(अपील) / The CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur
6. गार्ड फाईल / Guard File (ITA No. 825/JP/2013)

आदेशानुसार / By order,

सहायक पंजीकार / Assistant. Registrar.