

**IN THE INCOME TAX APPELLATE TRIBUNAL,  
CUTTACK BENCH, CUTTACK**

**BEFORE S/SHRI N.S SAINI, ACCOUNTANT MEMBER  
AND PAVAN KUMAR GADALE, JUDICIAL MEMBER**

**ITA No. 42/CTK/2016**  
Assessment Year : 2009-2010

DCIT, Corporate Circle 1(1), Bhubaneswar	Vs.	M/s. A.K.Das Associates Ltd., H-1, Satya Nagar, Bhubaneswar-07
PAN/GIR No.AACCA 9617 J		
<b>(Appellant)</b>	..	<b>( Respondent)</b>

Assessee by : None  
Revenue by : Shri D.K.Pradhan, DR

**Date of Hearing : 31/07/ 2017**  
**Date of Pronouncement : 31 /07/ 2017**

**ORDER**

**Per N.S.Saini, AM**

1. This is an appeal filed by the Revenue against the order of the CIT(A)-1, Bhubaneswar dated 10.11.2015 for the assessment year 2009-2010.

2. The sole grievance of the revenue in this appeal is that the CIT(A) was not justified in deleting the addition of Rs.66,19,040/- made by the Assessing Officer u/s.43B on account of unpaid service tax.

3. The brief facts of the case are that the Assessing Officer found from the balance sheet as on 31.3.2009 that service tax payable was shown at Rs. 1,38,27,472/- under the head current liabilities and provisions. He further found that out of this, a sum of Rs.66,19,040/- was the liability pertaining to the previous year in question. The Assessing Officer required

the assessee to explain as to why the amount of Rs.66,19,040/- pertaining to relevant assessment year being unpaid service tax liability should not be disallowed. In response to the query of the Assessing Officer, the assessee submitted as under:

*"The assessee maintains a mercantile system of account. It had collected service Tax during the previous year relevant to the assessment year in question. The service tax amount of Rs. 66,29,040/- was not deposited by the assessee with the concerned authorities also the assessee did not claim any deduct/on in this regard of did it debit the amount as an expenditure in the profit & loss account."*

The Assessing Officer did not accept the explanation of the assessee and relying on the decision of the Hon'ble Supreme Court in the cases of Kedarnath Jute Manufacturing Co. Ltd. vs. CIT, S2 ITR 363 and Sutlej Cotton Mills Ltd. vs. CIT, 136 ITR 1, rejected the explanation of the assessee and made an addition of Rs.66,19,040/- u/s.43B.

4. On appeal before the CIT(A), the assessee reiterated the submission made before the Assessing Officer. It was further submitted that since no part of service tax liability has been claimed as an expenditure, the question of disallowing the unpaid service tax liability does not arise. It was also argued that the Assessing Officer was not justified in making the addition on the basis of the judgments of the Hon'ble Apex Court in the cases of Kedarnath Jute Manufacturing" Co. Ltd. vs. CIT and Sutlej Cotton Mills Ltd. vs. CIT (supra) which were delivered by the Hon'ble court much before the insertion of section 43B in the I. T. Act w. e. f. 1.4.1984. It was further stated that the service tax was not routed through the P&L account and

hence cannot be disallowed u/s.43B. To support the above contention, he referred to the following decisions:

- i) CIT vs. Noble And Hewitt (I) Pvt. Ltd. (2008) 305 ITR 324 (Delhi)
- ii) ACIT vs. Real Image Media Technologies (P) Ltd. (ITAT Chennai)
- iii) Nafe Singh Gahlawat vs. ACIT;
- iv) DCIT vs. Ovira Logistics (P) Ltd. (ITAT Mumbai)

5. After considering the submissions of the assessee, the CIT(A) deleted the disallowance by observing as under:

"I have considered the contentions of the assessee and also the facts of the case. It is a fact that the decisions of the Hon'ble Apex Court relying upon which the AO has made the addition are not applicable so far as applicability of section 43B is concerned, having been delivered in a different context altogether and much before insertion of section 43B in the Act.

In the case of ACIT vs. Real Image Media Technologies (P) Ltd., 116 01\$ rj 964 (-ITAT Chennai), it has been held by the Hon'ble ITAT that the rigour of /section 43B may be applicable in the case of sale-tax or excise duty but the same cannot be said to be the position in case of service-tax because of two reasons. The assessee is never allowed deduction on account of service tax which is collected on behalf of the government and paid to the government 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 be made and the same has been correctly deleted by the CIT(A). If there is no liability to make the payment to the credit of 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'. Since service tax was not payable by the assessee, the rigour of section 43B could not have been applied to the case of the assessee.

Such a view has also been taken by the ITAT, Lucknow Bench in their order dt. 15.3.2013 in ITAT No.516/LKW/2011 in the case of Shri Rajeev Kant Chadda. In fact, the Lucknow Bench has heavily relied on the decision of the Chennai Bench cited (supra). I also find that the Hon'ble Delhi High Court in the case of CIT vs. Noble and Hewitt (I) (P) Ltd. (2008) 305 ITR 324 (Delhi) while rejecting the appeal against the order of the ITAT 'd' Bench New Delhi has held as under:

"5. Learned counsel for the Revenue urges that the decision of the Calcutta High Court in Chowringhee Sales Bureau (supra) covers the point in its favour. 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 ss. 10(1) and 10(2)(xv) of the IT 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 P&L a/c. Moreover the provisions of s. 43B of the Act are quite clear in this regard. The decision of the Calcutta High Court in Chowringhee Sales Bureau (supra) was not in the context of the applicability of s. 43B of the Act.

6. In our opinion since the assessee did not debit the amount to the P&L a/c 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."

The assessee appears to be squarely covered by the decisions discussed above. Accordingly, the disallowance of Rs.66,19,040/- u/s.43B is directed to be deleted."

6. When the appeal was called for hearing, none was present on behalf of the respondent- assessee. The Bench was of the view that the appeal of the revenue can be disposed of exparte qua-the respondent assessee after considering the materials available on record and submission of the Id D.R. Therefore, the appeal was heard exparte qua the respondent- assessee and disposed of accordingly.

7. After hearing Id D.R. and perusing the orders of lower authorities, we find that Ld D.R except relying on the order of the Assessing Officer could not point out any specific error in the order of the CIT(A). Hence, we find no good reason to interfere with the order of the CIT(A), which is hereby confirmed and dismiss this ground of appeal of the revenue.

8. In the result, appeal of the revenue is dismissed.

Order pronounced in the open court on 31/07/2017.

Sd/-  
**(Pavan Kumar Gadale)**  
**JUDICIALMEMBER**

sd/-  
**(N.S Saini)**  
**ACCOUNTANT MEMBER**

Cuttack; Dated 31 /07/2017  
B.K.Parida, SPS

**Copy of the Order forwarded to :**

1. The Appellant : DCIT, Corporate Circle 1(1), Bhubaneswar
2. The Respondent. M/s. A.K.Das Associates Ltd., H-1, Satya Nagar, Bhubaneswar-07
3. The CIT(A)-1, Bhubaneswar
4. Pr.CIT-1, Bhubaenswar
5. DR, ITAT, Cuttack
6. Guard file.  
//True Copy//

BY ORDER,

SR.PRIVATE SECRETARY  
**ITAT, Cuttack**