

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCHES: 'B', NEW DELHI

BEFORE SHRI N.K.BILLAIYA, ACCOUNTANT MEMBER
AND SMT. BEENA A PILLAI, JUDICIAL MEMBER

ITA No. 2711/Del/2015
AY: 2011-12

ACIT, Circle 33(1) Room No.1305 13 th floor, E-2 Pratyakshya Kar Bhawan Shayama Prasad Mukherjee Civic Centre JL Nehru Marg Minto Road New Delhi 110 002	vs.	Alpasso International Engineering Company 4 th Floor, Mohindra Tower 2A, Bhikaji Cama Place New Delhi 110 066 PAN: AAMFA1300P
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(Appellant)

(Respondent)

Department by : Ms.Nidhi Srivastava, CIT, D.R.
Assessee by : Sh. Ashish Goel, C.A.

Date of Hearing : 04/02/2019
Date of Pronouncement: 07/02/2019

ORDER

PER BEENA A PILLAI, JUDICIAL MEMBER

Present appeal has been filed by Revenue against order dated 05.02.2015 of Ld.CIT(A)-II, New Delhi for A.Y.2011-12 on following grounds.

" 1. Ld.CIT(A) has erred, on the facts and circumstances of the case, in deleting the addition of Rs.1,49,48,842/- made by AO u/s 43B of the I.T. Act, 1961 (the Act) as the assessee failed to deposit service tax amounting to Rs.1,49,48,842/- to the Central Govt. Account well before filing of return.

2. Ld.CIT(A) has erred in law in deleting the above addition by ignoring the provisions of section 43B of the Act. In this case, the provisions of section 43B of the Act have overriding effect over Rule 6 of the service tax rules, 1994 clearly.

3. The appellant craves leave to add, alter or amend any of the grounds of appeal before or during the course of hearing of appeal."

2. Brief facts of the case are as under:

Assessee filed its return of income on 29/09/11 declaring total income of Rs.12,14,28,450/-. The case was subsequently selected for scrutiny and notice under section 143(2), 142(1) of the I.T.Act, 1961 (the Act) along with questionnaire was issued to assessee. In response to statutory notices, representative of assessee appeared before Ld. AO and filed nicely details as called for.

2.1. Ld. AO observed that assessee is engaged in business of logistics, installation and commissioning of electrical equipments etc., and derived income from business, short term capital gain and other sources.

2.2. Ld.AO on perusal of 26 AS statement observed that total receipts for year was Rs.37.50 crores, whereas assessee only declared Rs.34.01 crore in the P&L account. It was accordingly called upon to explain difference. Assessee submitted that

amount of Rs.1.49 crores pertain to service tax, which was not rooted through P&L account and details were furnished before Ld.AO. Ld.AO accordingly called upon assessee to show cause as to why amount of Rs.1.49 crores should not be disallowed under section 43B of the Act. Assessee filed its reply vide letter dated 07/01/14 and stated that receipts pertaining to outstanding service tax had not been received from recipient debtors and therefore deposit of service tax on unrealised contract receipts had not become payable as per Rule 6 of Service Tax Rules 1994. Ld.AO after considering details filed by assessee was of the opinion that assessee has not deposited sum of Rs.1.49 crores before due date and therefore same was disallowed under section 43B of the Act.

3. Aggrieved by order of Ld.AO, assessee preferred appeal before Ld. CIT(A), who allowed claim of assessee by observing as under:

"4.1.2. I have carefully considered the submissions of the appellant and perused the order passed by the Ld. AO. The assessee is partnership firm and is engaged in the business of logistics, installation and commissioning of electrical equipments and has derives income from the business, short term capitals and other sources and has maintained its accounts on mercantile basis and shown a sum of Rs.1,49,48,482/- as service tax payable in its annual account for the relevant assessment year. The appellant has submitted all the relevant details called for by the AO. The appellant has filed details of service tax due but not payable as on the date of balance sheet and reconciliation of amount receivable

from debtors and service tax along with ledger of accounts of the debtors.

4.1.3. It is valid proposition that under section 43B read with rule 6 of the service Tax Rules (applicable in the relevant assessment year) service tax was payable only when once the payment of remuneration for services rendered has been received by the assessee and as such that service tax was payable not by the assessee since payment for such services has not been received and when the amount is not payable; the question of disallowance does not arise. The above position is further established by the amendment by The Finance Act, 2011 which basically provides that from April 1, 2011, service tax will have to be paid on accrual basis meaning thereby till March 31, 2011 service tax is payable on collection or receipt basis, that is when you realise your dues you pay the service tax but from April 1, 2011 now service tax will have to be paid irrespective of the fact whether payment of service tax is received or not.

4.1.4. On perusal of copy of accounts of sundry debtors parties pertaining to the year under consideration, it is observed that from one of the parties namely M/s L&T (T-3) Transformer entire outstanding receipts of Rs.1.65 crore shown as outstanding as on 31-03-2011 has been shown as received on 6.4.11. Similarly, in respect of other Sundry Debtors also the contract receipts were received by it before the due date of filing of return for the A.Y. 2011-12 and that the appellant has itself claimed TDS in the return against entire composite receipts which included service tax portion of receipts and therefore, the appellant is under legal obligation to declare the entire receipts credited in its accounts and

then seek deduction of only actual liability of service tax, which is either paid during the previous year itself or paid before the due date of filing of return for the A.Y. 2011-12. Though the appellant has a running account with its debtors each and every receipts is clearly and distinctively identifiable. against each bill and that in some cases the amount outstanding has been received by the appellant in due course of time in the next year on 6.4.11 (i.e. financial year 2011-12) which is date before the due date for filing of the return. Basically, something is payable only when it has become due and here the service tax was due on receipt of entire amount i.e. in the financial year and was payable in the next year on receipt of service consideration and that was in fact paid in next year. The unpaid service tax was not claimed as expenses in its accounts.

4.1.5. Considering the facts and circumstances of the case and judicial pronouncements on the issue, I hold that that during the relevant year service tax on the unrealized contract receipts has not become payable as per the provisions of Rule 6 of the Service Tax Rules, 1994 and that the same cannot be disallowed as not paid u/s 43B of the Income Tax Act. Therefore, the addition made by the Ld.AO cannot be sustained and the same is directed to be deleted."

4. Aggrieved by order of Ld.CIT (A) revenue is in appeal before us now.

5. Ld.CIT DR placed reliance upon order of Ld.AO, however, could not controvert factual observations made by Ld.CIT(A).

6. Ld.AR however, brought to our notice page 6 of paper book, wherein balance sheet reveals service tax payable recorded

under 'current liabilities and provisions'. Page 7 of paper book is profit and loss account for year ending 31/03/11, wherein, no expenses has been claimed pertaining to service tax payments during the year. He placed reliance upon decision of *Hon'ble Delhi High Court* in case of *CIT vs. Noble and Hewitt (I) Pvt. Ltd.*, reported in (2008) 305 ITR 324.

7. We have perused submissions advanced by both sides in light of records placed before us.

7.1. Assessee before us maintains its account on Mercantile basis and had shown a sum of Rs.1,49,48,482/-, as service tax payable in its annual account for year under consideration. Finance Act,2011 provides that, from 01/04/11 service tax will have to be paid on accrual basis, meaning thereby, till 31/03/11 service tax was payable on collection or receipt basis, i.e. when dues are realised, service tax was payable. The case of assessee is that during relevant financial year, service tax was payable upon realisation of dues and assessee had made a provision in balance sheet for outstanding service tax payable, which was not claimed in profit and loss account as expenditure. The same has been demonstrated by Ld.AR from audited accounts placed at page 1-7 of paper book. We have perused decision relied upon by Ld.AR, wherein *Hon'ble Court* observed that:

"6. In our opinion since the assessee did not debit the amount of profit and 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." In our opinion the facts before us is identical to facts in case of *CIT vs. Noble and Hewitt (I) Pvt. Ltd.*, (supra). Respectfully

following the same, we are inclined to uphold the view of Ld. CIT (A).

7.2. Accordingly grounds raised by revenue stands dismissed.

8. In the result appeal filed by revenue stands dismissed.

Order pronounced in the open court on 07th February, 2019.

Sd/-

**(N.K.BILLAIYA)
ACCOUNTANT MEMBER**

Sd/-

**(BEENA A PILLAI)
JUDICIAL MEMBER**

Dt. 07th February, 2019

- GMV

Copy forwarded to: -

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT

- TRUE COPY -

By Order,

ASSISTANT REGISTRAR
ITAT Delhi Benches

ITA No. 2711/Del/2015 AY:2011-12
ACIT vs. Alpasso International Engineering Company

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