

**In the Income-Tax Appellate Tribunal,
Delhi Bench 'G', New Delhi**

**Before : Shri Amit Shukla, Judicial Member And
Shri L.P. Sahu, Accountant Member**

**ITA No. 4703 to 4705/Del/2016
Assessment Year: 2009-10 to 2011-12**

Addl. CIT, Special Range-8, New Delhi. (Appellant)	vs.	SBI Cards & Payments Services Pvt. Ltd., 401-402, 4 th Floor, Aggarwal Millennium Tower, New Delhi (PAN: AAEC5981K) (Respondent)
---	------------	--

Appellant by	Sh. S.S. Rana, CIT/DR
Respondent by	Sh. Tushar Jarwal, Advocate Sh. Rahul Sateerja, Advocate

Date of Hearing	16.05.2019
Date of Pronouncement	28.05.2019

ORDER

Per L.P. Sahu, A.M.:

All these appeals are directed by the Revenue against the orders of the Id. CIT(A)-28, New Delhi dated 14.06.2016 for the assessment years 2009-10 to 2011-12 respectively. Since the solitary issue involved in all these appeals pertains to disallowance of service tax payable u/s. 43B of the Act, all these appeals are being disposed of by this consolidated order. We first take up the appeal for A.Y. 2009-10, the decision on which shall equally apply to other two appeals of the Revenue.

2. The solitary ground raised in appeal for A.Y. 2009-10 reads as under :

1. *"Whether on the facts and circumstances of the case and in law the Ld. CIT(A) was justified in deleting the addition of Rs. 41,55,10,732/- made by the AO on account of service tax payable u/s 43B of the I.T. Act, 1961 by holding that the assessee neither debited the amount to the P&L Account as an expenditure nor claimed any deduction in respect of said amount. On the contrary the AO had held that the treatment followed by the assessee of not routing service tax through the P&L Account will not alter the liability u/s 43B of the I.T. Act, 1961".*

3. The brief facts of the case are that the assessee filed return of income on 29.09.2009 declaring loss of Rs.261,33,60,065/-. The case was selected for scrutiny and statutory notices were issued to the assessee. In the assessment proceedings, the AO noticed that in the tax audit report at clause 21(i) it is stated as under :

"As per provisions of service tax, the liability to pay service tax arises only at the point of time when customer pays for the service.

Hence, Rs.41,55,10,732/- representing the amount of service tax payable as per books in respect of customer debts outstanding has been regard by the assessee as not being covered under section 43B since it does represent liability incurred."

4. The Assessing Officer noticed that there was no any documentary evidence that the assessee has recovered the amount of service tax from recipient of the services. The assessee had maintained a separate ledger account in which he enters the service tax when he received and paid to the Central Government on particular date. The assessee had also maintained running account of the customers. The Assessing Officer also noted that the contention of the assessee is

not acceptable due to the assessee was unable to explain whether the payment of service tax was received from the customers or not. He also noted that the service tax charge if not routed through the profit and loss account, would not alter the liability u/s. 43B. The Assessing Officer also observed that merely because the service tax was not routed through the profit and loss account, the expenditure would not be considered to have been claimed. Accordingly, he made addition of Rs.41,55,10,732/-. Aggrieved from the order of the Assessing Officer, the assessee appealed before the Id. CIT(A) and made detailed written submissions also. The Id.CIT(A), after considering the relevant rules of service tax and case laws relied by the assessee, allowed the appeal of the assessee. Aggrieved by the impugned order, the revenue is in appeal before the Tribunal.

5. The Id. DR submitted that the service tax liability not discharged into the profit and loss account by the assessee is hit by the provisions of section 43B of the Act. Accordingly, the amount of service tax which has not been paid as per section 43B is not allowable. He also submitted that even if the assessee has not shown the service tax in profit and loss account, the assessee had shown the liability thereof directly in the balance sheet. He relied on the judgment of Tribunal in the case of Hemkunt Infra Tech (ITA No. 6683/Del/2013).

6. The Id. AR, on the other hand, reiterated the submissions made before the Id.CIT(A) and submitted that the case of the assessee is covered in his favour by the decision of jurisdictional High Court in the case of Noble and Hewitt (India) P. Ltd. (2008) 166 taxman 48 (Delhi) and the decision of Bombay High Court in PCIT

vs. TOP Security Ltd. (2018) 97 taxmann.com 525(Bombay), the SLP against which stood dismissed by Hon'ble Supreme Court.

7. We have heard the submissions of both the parties and have gone through the entire material available on record and we find that the Id. CIT(A) has allowed the appeal of the assessee after recording detailed findings which read as under :

"7.1 I have carefully considered the fact of the case ,finding of the A.O and the submission of the L.d AR .Service tax a Central tax that was introduced by making provisions in Chapter V of the Finance Act 1994 (Section 64 to Section 96). The Act provides the method of levy, the circumstances in which the levy would arise, inter alia, the manner of payment etc. Section 68 of the Act prior to its amendment on 16.10.1998 envisaged that the person providing taxable service must collect service tax and then pay it to the Government account only when such person failed to collect the tax person is liable to pay the tax. However with effect from 16.10.1998 Section 68 was amended by omitting the element of 'collection' and it provides that the duty of the paying the service tax is on the person providing the service in the prescribed manner. The manner is prescribed in Rule 6 which prescribes that the service tax is required to be paid only on the value of taxable services received in a particular month or quarter as the case may be and not on the gross amount charged or billed to the client

7.2 Hence prior to the introduction of point of Taxation Rules 2011, the liability to make payment of service tax arose only upon receipts of payments from the service recipients . 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'. Since in the case under consideration the appellant has not received the service tax in question ,the liability to pay the same in the Government account does not arise. Further in the case under consideration no part of receipt of service tax has been taken to the P&L A/c . The fact that the service tax has not been routed through the Profit 8s Loss Account has also been certified by the auditor in Clause 13(a) of

the TAR. Hence , since the assessee neither debited the amount to the P&L A/c as an expenditure nor claim any deduction in respect of the said amount , there is no reason for disallowing the amount which has not been claimed as deduction by the appellant . Considering above and respectively following the decisions cited above the addition of Rs. 41,55,10,732/ made by the Assessing Officer on account of service tax payable under section 43B of the Act is deleted."

8. The Id. CIT(A) has made good reasoned order, which needs no interference. In fact, the issue under consideration is covered in favour of the assessee by the decision of Hon'ble Jurisdictional High Court in the case of Noble and Hewitt (India) P. Ltd. (supra) and the decision of Bombay High Court in PCIT vs. TOP Security Ltd. (supra). The SLP filed by Revenue against this decision of Bombay High Court also stood dismissed by Hon'ble Supreme Court. The case law relied by the Id. DR is not applicable because the point of taxation Rule has been introduced from 2011 and the case of the assessee is for the assessment years prior to introduction of amended provisions. We, therefore, do not find any justification to interfere with the order of the Id. CIT(A). Accordingly, the appeal of the Revenue deserves to be dismissed. Since, the grounds and facts involved in other two appeals are identical, the appeals of Revenue for A. Yrs. 2010-11 and 2011-12 also fail.

9. In the result, all the three appeals of the Revenue are dismissed.

Order pronounced in the open court on 28.05.2019.

Sd/-

(Amit Shukla)
Judicial member

Sd/-

(L.P. Sahu)
Accountant Member

Dated: 28.05.2019