

IN THE INCOME-TAX APPELLATE TRIBUNAL "C" BENCH MUMBAI

BEFORE SHRI R.C. SHARMA, ACCOUNTANT MEMBER AND

SHRI PAWAN SINGH JUDICIAL MEMBER

ITA No. 4789/Mum/2016 (Assessment Year 2007-08)

ITA No. 4790/Mum/2016 (Assessment Year 2010-11)

M/s. Interex Arch Design Pvt. Ltd., Office No.3, Kailash Nagar, Tardeo Road, Tardeo, Mumbai-400007. <b>PAN: AABCI3867K</b>	Vs.	DCIT, Circle-5(2)(1) Aayakar Bhawan, M. K. Road, Mumbai-400020.
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Appellant

Respondent

Appellant by : Shri Ajay R. Singh (AR)

Respondent by : Shri Chaudhary Arun Kumar Singh (DR)

Date of Hearing : 29.08.2019

Date of Pronouncement : 01.10.2019

**ORDER UNDER SECTION 254(1) OF INCOME TAX ACT**

**PER PAWAN SINGH, JUDICIAL MEMBER;**

1. These two appeals by assessee are directed against the separate orders of Id. CIT(A)-10, Mumbai dated 29.04.2016 for Assessment Year 2007-08 & 2010-11. These appeals were initially decided vide order dated 29.09.2018. However, subsequently the order was recalled in Miscellaneous Application No. 612 & 613/Mum/2018 dated 03.05.2019. Hence, both the appeals were heard afresh.
2. In ITA No. 4789/Mum/2016 for AY 2007-08, the assessee has raised the following grounds of appeal:

1.1 The Ld. Comm. of Income Tax (Appeal) - 10, Mumbai has erred in upholding the finding of the AO that there is no mistake apparent from record in the order passed u/s 143(3) dated 20.07.2009 by the AO and consequently upholding the action of the AO in rejecting the application filed u/s 154 of the Act.

1.2 The Ld. Comm. of Income Tax (Appeal) - 10 Mumbai, has erred in law and in facts in not appreciating the contention and submission of the assessee that during the relevant previous year, service tax was not applicable on the work contract and as such the disallowance made by the assessee in the computation is wrong and incorrect which needs to be rectified.

1.3 The Ld. Comm. of Income Tax (Appeal)- 10 Mumbai is incorrect in holding that the amount which remained unpaid was not added back in the computation of income by the Appellant.

1.4 The Ld. Comm. of Income Tax (Appeal)- 10 Mumbai, has erred in law and in facts in not appreciating the contention and submission of the assessee that the AO ought to compute the correct income of the assessee.

2. Brief facts of the case are that the assessee is a company engaged in the business of interior designing and turnkey projects contracts, filed its return of income for Assessment Year 2007-08 on 31.10.2007 declaring income of Rs. 76,19,992/-. The case was selected for scrutiny and assessment was completed on 28.07.2009 under section 143(3) determining the total income of Rs. 79,85,880/-. The Assessing Officer made the disallowance on travelling expenses of Rs. 1,32,437/- and disallowance under section 43B of Rs. 2,33,446/-. The assessee filed application for rectification under section 154 stating therein that disallowance under section 43B on payment to Gujarat Value Added

Tax (Gujarat VAT) of service tax was wrong and incorrect and required rectification. The application of assessee was rejected by Assessing Officer holding that there is no mistake in the order. On further appeal before the Id. CIT(A), the action of Assessing Officer was confirmed. Thus, further aggrieved, the assessee has filed the present appeal before this Tribunal.

3. We have heard the submission of Id. Authorized Representative (AR) of the assessee and Id. Departmental Representative (DR) for the revenue and gone through the orders of lower authorities. The Id. AR of the assessee submits that the disallowance made under section 43B in assessment order is contrary to the law. The levy of service tax on work contract was not applicable during the relevant period as the same was brought to tax only w.e.f. 01.06.2007. The Id. AR of the assessee also filed a reconciliation of disallowance under section 43B as per page No. 24 of the paper book, which is part of tax Audit report. The Id. AR of the assessee submits that a direction may be issued to the Assessing Officer to verify the reconciliation and pass the order accordingly.
4. On the other hand, the Id. DR for the revenue supported the order of lower authorities.
5. We have considered the submission of both the parties and perused the material available on record. The Assessing Officer made disallowance under section 43B by taking view that Gujarat VAT of Rs. 2,33,446/-

was not paid as per the provisions of section 43B and disallowed accordingly. The application filed by assessee under section 154 was also rejected by the Assessing Officer. The Id. CIT(A) confirmed the action of Assessing Officer by taking view that the amount was shown in the books of assessee as collected but not paid to Gujarat VAT authority. The Auditor has clearly pointed out this fact in its report. Therefore, there was no mistake in the order of Assessing Officer. Before us, the Id. AR of the assessee made two fold submission i.e. (i) levy of service tax on one work contract was not applicable during the Assessment Year 2007-08 as the same was brought to tax by Finance Act w.e.f. 01.06.2007 and (ii) the Assessing Officer has not verified the reconciliation. Considering the second submission of assessee that reconciliation was not examined by the Assessing Officer, therefore, we restored this issue to the file of Assessing Officer to examine the reconciliation of liability under section 43B, which is part of Audit report, afresh and pass the order in accordance with law. Needless to order that before passing the order the Assessing Officer shall grant opportunity to the assessee.

6. In the result, this ground of appeal is allowed for statistical purpose.

**ITA No. 4790/Mum/2016 for A.Y. 2010-11**

7. The assessee has raised the following grounds of appeal:

1.1 On the facts and in the circumstances of the case and in law, the learned CIT Appeal has erred in confirming the disallowance of deduction claimed u/s 43B by the assessee in respect of service tax amount reversed in the books of accounts during the relevant previous year.

1.2 Reasons assigned by him for confirming the disallowance of deduction claimed by the assessee are wrong and insufficient.

1.3 The Ld. Comm of Income Tax (Appeal)- 10 Mumbai, has erred in law and in facts in not appreciating the contention and submission of the assessee that on reversal of the service tax in the books of account, no service tax remain payable and as such disallowance made in respect of unpaid service tax liability u/s 43B in earlier year is deductible

2.1 The Ld. Comm of Income Tax (Appeal)- 10 Mumbai, has erred in upholding the action of the AO in not allowing the deduction of disallowance wrongly made by the assessee in respect of employees contribution to Provident Fund and ESIC in the computation of income.

2.2 Reasons assigned by him for confirming the disallowance of deduction claimed by the assessee are wrong and insufficient.

2.3 The Ld. Comm of Income Tax (Appeal)- 10 Mumbai, has erred in law and in facts in not appreciating the contention and submission of the assessee that the employees contribution to Provident Fund & ESIC though delayed but made before the due date of filing of return is deductible in view of the judgment of the Appex Court in the case of CIT vs Alom Extrusion Limited.

8. Facts in brief are that the assessee filed its return of income for A.Y. 2010-11 on 31.03.2010 declaring total income of Rs. 54,39,400/-. The case was selected for scrutiny and assessment was completed under section 143(3) on 31.01.2013. The Assessing Officer while passing the assessment order made addition under section 43B of Rs. 18,65,555/- and disallowance of Rs. 2,22,788/- under section 36(v)(ia) on account of delay in filing ESI & PF Contribution after due date. On appeal before

the ld. CIT(A), the action of Assessing Officer on both the disallowance was confirmed.

9. We have heard the submission of ld. AR of the assessee and ld. DR for the revenue. The ld. AR of the assessee submits that Ground No.1 is identical to the Ground No.1 in appeal for A.Y. 2007-08, the Assessing Officer made disallowance on service tax due to non-payment in A.Y. 2007-08 as well. Part payment, which was made in the year under consideration and remaining amount, was reversed by the assessee. The Assessing Officer disallowed the remaining amount in this year. The ld. AR of the assessee submits that in case, the disallowance for A.Y. 2007-08 under section 43B is restored to the file of Assessing Officer, accordingly the issue for the year under consideration may also be restored to the file of Assessing Officer.
10. On the other hand, the ld. DR for the revenue supported the order of lower authorities.
11. We have considered the submission of both the parties and found that we have restored the similar issue to the file of Assessing Officer for verification of reconciliation. Therefore, this ground is restored to the file of Assessing Officer to verify the fact and grant appropriate relief to the assessee in accordance with law.
12. In the result, Ground No.1 of this appeal is allowed for statistical purpose.

13. Ground No.2 relates to disallowance of ESI & PF Contribution due to delay in deposit. The ld. AR of the assessee submits that though there was delay in deposit of ESI and PF Contribution, though it was deposited before the due date of filing return of income. The ld. AR of the assessee submits that this ground of appeal is covered by the decision of Hon'ble Bombay High Court in case of CIT vs. Ghatge Patil Transporters Ltd. [368 ITR 749 (Bom)].

14. On the other hand, the ld. DR for the revenue supported the order of lower authorities.

15. We have considered the submission of both the parties and gone through the order of lower authorities. We have also gone through the various documentary evidences furnished by assessee from the record. We find that the assessee while computing the total income for A.Y. 2010-11 has disallowed a sum of Rs. 2,22,788/- being ESI and PF Contribution being paid after due date but before the date of filing return of income. We find that similar addition was made in A.Y. 2009-10 and on appeal before the ld. CIT(A), the addition/disallowance was deleted. Therefore, considering the fact that assessee claimed that the Employees Contribution was deposited before the due date on filing of return. Therefore, we direct the Assessing Officer to verify the facts about the deposits of Employees Contribution, if the same was deposited before

the due date and grant relief to the assessee by following the decision of Hon'ble Bombay High Court in Ghatge Patil Transporters Ltd. (supra).

16. In the result, appeal of the assessee is allowed.

Order pronounced in the open court on 01/10/2019.

**Sd/-**  
**R.C. SHARMA**  
**ACCOUNTANT MEMBER**

**Sd/-**  
**PAWAN SINGH**  
**JUDICIAL MEMBER**

Mumbai, Date: 01.10.2019

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**Copy of the Order forwarded to :**

1. Assessee
2. Respondent
3. The concerned CIT(A)
4. The concerned CIT
5. DR "C" Bench, ITAT, Mumbai
6. Guard File

**BY ORDER,**

**Dy./Asst. Registrar**  
**ITAT, Mumbai**