आयकरअपीलीयअधिकरणन्यायपीठरायपुरमें।

IN THE INCOME TAX APPELLATE TRIBUNAL,
RAIPUR BENCH, RAIPUR

BEFORE SHRI ANIL CHATURVEDI, AM AND
SHRI PARTHA SARATHI CHAUDHURY,JM

आयकर अपील सं. / ITA No.222& 318/RPR/2014

निर्धारण वर्ष / Assessment Year : 2010-11& 2011-12

Deputy Commissioner of Income-tax-1,
Bhilai

.....अपीलार्थी / Appellant

बनाम / V/s.

ShriSandeepSurendran Nair,
Prop. M/s. Basava Engineering Construction,
113, Friends Arcade, Shastri Nagar,
Supela, Bhilai (C.G.)

PAN: ACZPN2865M

.....प्रत्यर्थी / Respondent

Assessee by	:ShriMakarand Joshi and ShriAniruddhaKavimandan
Revenue by	:Smt. AnubhaTahGoel

सुनवाई की तारीख / Date of Hearing :07.11.2019

घोषणा की तारीख / Date of Pronouncement :08.11.2019

आदेश / ORDER

PERANIL CHATURVEDI, AM:

Thecaptioned appeals preferred by the Revenue emanate from the respective orders of the Ld. CIT(A), Raipur, dated 15.07.2014 and 28.08.2014, for the assessment years 2010-11 and 2011-12, respectively.

2. Before us, both the parties at the outset submitted that though the appeals of Revenue are for two different years but the facts and issues in both the appeals are identical except for the assessment year and amounts involved and therefore, the arguments made by them would be common for both the appeals. In view of the aforesaid submissions of the parties, we for the sake of convenience, proceed to dispose of both the appeals by a consolidated order but however proceed to narrate with the facts for A.Y. 2010-11 in ITA No.222/RPR/2014.

3. The relevant facts as culled out from the material on record are asunder :-

The assessee is an individual, who is stated to be carrying on the business of mechanical contractor in the name of M/s. Basava Engineering Construction. The assessee filed his return of income for A.Y. 2010-11 on 12.09.2010 declaring total income at Rs.92,51,140/-. The case was taken up for scrutiny. Thereafter, assessment was framed u/s 143(3) of the Act vide order dated 28.03.2013 and the total income was

determined at Rs.3,00,49,340/-. Aggrieved by the order of Assessing Officer, assessee carried the matter before Ld.CIT(A), who vide order dated 15.07.2014 (in appeal No.171/13-14) had granted substantial relief to the assessee.Aggrieved by the order of Ld.CIT(A), Revenue is now in appeal before us and has raised the following grounds :

> *"1. Whether in law and on facts and circumstances of the case, the learned CIT(A) has erred in deleting the addition of Rs.10,43,114/- made by the AO on account of suppression of gross turnover as the assessee has claimed benefit of TDS made against the said amount?*
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> *2. Whether in law and on facts and circumstances of the case, the learned CIT(A) has erred in deleting the addition u/s. 43B of Rs.96,505/- made by the AO as the professional tax remained outstanding?*
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> *3. Whether in law and on facts and circumstances of the case, the learned CIT(A) has erred in deleting the addition on account of disallowance u/s. 40(a)(ia) of the I.T. Act 1961 of interest and finance charges of Rs.4,66,658/- paid to various NBFCs by the assessee as the assesse failed to deduct TDS?*
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> *4. Whether in law and on facts and circumstances of the case, the learned CIT(A) has erred in deleting the addition of Rs.1,90,81,660/- made by the AO as the service tax collected remained not deposited in the Government A/c.?"*

4. The ground No.1 is with respect to deleting the addition of Rs.10,43,114/- by the CIT(A).

5. During the course of assessment proceedings, the Assessing Officer noticed that the assessee had stated to have received Mobilization advance from Mangalam Cement Ltd. on which TDS was deducted and it was claimed as prepaid taxes by the assessee. The Assessing Officer therefore, was of the view that corresponding amount of Mobilization advance should

have been offered to tax. He accordingly, made addition of Rs.10,43,114/-. Aggrieved by the order of Assessing Officer, assessee carried the matter before the CIT(A), who deleted the addition made by Assessing Officer by observing as under:-

> *"6. I have carefully gone through the assessment order and submissions of the appellant. I have also perused the Work order issued by Mangalam Cement Limited and as per Clause 5 of the said work order dated 24.9.2009,Mangalam Cement Limited was to pay advance of 10% of estimated value of order against the Bank Guarantee. The submission of the appellant that the sum of Rs.10,43,114/- represents the mobilization advance cannot be brushed aside as, in my considered opinion it is quite customary in this line of business to pay mobilization advance for commencement of operations and to ensure liquidity. It is not the case of the A.O that the income had accrued and became due to the appellant during the year under consideration itself. The merefact that the appellant has claimed credit for TDS does not alter the nature of receipt from advance to income. The statute mandates deduction of tax at source even on advance payments by providing that tax is deductible at the time of payment or credit whichever is earlier, thus,the law itself envisages deduction of TDS from advance payments and not just at the time of crediting the account of payee against the expenses. In the case of Smt.PushpaVijoy vs. Assistant Commissioner of Income Tax (2005) 4 SOT 589 (Coch), it was held that "The TDS made in a particular assessment year should be given credit in the assessment of the respective assessment year itself. There is no provision in the IT Act to divide the TDS into different proportionate pieces and to give credit on the basis whether the entire income has been offered for assessment or not. There is also no provision in the IT Act to postpone the TDS credit to future assessment years other than the assessment year for which the TDS were made. Therefore, in substance the tax deducted at source must be attributed to the concerned assessment year and not to the particular item or source of income. If the tax deducted at source is attributed to that particular source or item of income, then the result will be perverse and chaotic. The provisions of law contained in s. 199 does not provide for any such casualty."*

The CIT(A) further after relying on the following decisions; deleted the addition made by Assessing Officer.

a) *Toyo Engg. India Ltd. Vs. Joint Commissioner of Income Tax (2006) 100 TTJ (Mumbai) 373 : (2006) 5 SOT 616 (Mumbai)*

b) *Transmission Corporation of AP Ltd. &Anr. Vs. CIT (1999) 239 ITR 587 (SC)*

c) *ITO Vs. T.G. Veeraraghavan (2007) 110 TTJ (Coch) 708.*

6. Aggrieved by the order of CIT(A), Revenue is now in appeal before us.

7. Before us, Ld. DRtook us through the order of Assessing Officer and supported the order of Assessing Officer. She submitted that the order of CIT(A) be set aside.

8. The Ld. AR on the other hand reiterated the submissions made before lower authorities and supported the order of CIT(A).

9. We have heard the rival submissions and perused the material on record.The issue in the present ground is with respect to addition of Rs.10,43,114/-. We find that CIT(A) after considering various decisions cited in his order has deleted the addition made by Assessing Officer. Before us, the Revenue could not point out any fallacy in the findings of CIT(A). In view of this, we find no reason to interfere with the order of CIT(A) and thus, **the ground No.1 of Revenue is dismissed.**

10. The ground No.2 is with respect to deleting the addition of Rs.96,505/- u/s 43B of the Income-tax Act, 1961 (hereinafter referred to as 'the Act').

11. During the course of assessment proceedings and perusing the tax audit report, the Assessing Officer noticed that the auditor had reported Rs.96,505/- being the amount of professional tax deducted from the employees but was not deposited till the date of filing the return of income. The assessee was asked to explain as to why the unpaid amount not be added to the total income, to which the assessee made submissions which were not found acceptable to the Assessing Officer. He accordingly, proceeded to disallow the aforesaid amount of Rs.96,505/- u/s 43B of the Act. Aggrieved by the order of Assessing Officer, assessee carried the matter before the CIT(A), who deleted the addition made by Assessing Officer by observing as under:-

> *"14. I have carefully gone through the assessment order and submissions of the appellant. It remains an undisputed fact that the appellant was prevented by reasonable cause due to which professional tax deducted from the salary of the employees could not be deposited to the Government Exchequer. It is also an undisputed fact that the appellant had credited the amounts so deducted to a separate account, secondly,undisputedly, debit to Profit &Loss A/cis on account of Salary and not Professional Tax. Section 43Bdoes not include in its ambit expenditure in the nature of 'salary' which is distinct from bonus and leave encashment, therefore, there is no question of disallowance of expenditure in the nature of salary debited to Profit &Loss A/c. Hence, the disallowance made by the A.O is deleted."*

12. Aggrieved by the order of CIT(A), Revenue is now in appeal before us.

13. Before us, Ld. DR took us through the order of Assessing Officer and supported the order of Assessing Officer.

14. The Ld. AR on the other hand reiterated the submissions made before the authorities below and supported the order of CIT(A).

15. We have heard the rival submissions and perused the material on record. The issue in the present ground is with respect to addition of Rs.96,505/-. We find that CIT(A) after considering submissions made by the assessee have deleted the addition made by Assessing Officer. Before us, the Revenue could not point out any fallacy in the findings of CIT(A). In view of this, we find no reason to interfere with the order of CIT(A) and thus, **the ground No.2 of Revenue is dismissed.**

16. The ground No.3 is with respect to deletion of disallowance u/s. 40(a)(ia) of the Act at Rs.4,66,658/-.

17. During the course of assessment proceedings, the Assessing Officer on perusing the Profit & Loss Account noticed that the assessee had debited Rs.16,25,244/- on account of finance charges which included the payment of interest aggregating Rs.4,66,658/- to various NBFCs. The Assessing Officer was of the view that the assessee was required to deduct TDS on the payment of interest u/s. 194A of the Act, which the assessee had failed to deduct. The Assessing Officer was therefore, of the view that provisions of section 40(a)(ia) of the Act are applicable. He accordingly, by applying the provisions of sec.40(a)(ia) of the Act made addition of

Rs.4,66,658/-. Aggrieved by the order of Assessing Officer, assessee carried the matter before the CIT(A). The CIT(A) after considering the submissions of assessee deleted the addition made by Assessing Officer by observing as under:-

> *"18. I have carefully gone through the assessment order and submissions of the appellant. It seen that the disallowance has been made by the AO by invoking the provisions of section 40(a)(ia). The entire interest pertains to finance charges paid/payable to the NBFCs. I have carefully gone through the various amendments brought by the Finance Act 2008,Finance Act 2010 and Finance Act 2012 in the provisions of section 40(a)(ia). I have also carefully gone through the various judicial pronouncements relied upon by the appellant. The appellant has vehemently placed reliance on the CBDT Circular No.5 of 2005 dated 15.07.2005 (2005) 197 CTR (St) 1]wherein it was clarified that the provisions of section 40(a)(ia)are to augment compliance of TDS provisions in the case of residents and curb bogus payments to them. In the instant case, it is an undisputed fact that the payments have been made through proper banking channel. It is seen that since the time section 40(a)(ia) was introduced in the statute book, the same has undergone various amendments and all such amendments viz. the amendment brought by the Finance Act 2008,Finance Act 2010 and Finance Act 2012 have extended relief to the taxpayers. Furthermore, I find that the Hon'ble Calcutta High Court in CIT v.Virgin Creations ITAT No.302 of 2011 GA 3200/2011 COMMISSIONER OF INCOME-TAX, KOL-XI, KOL VsVIRGIN CREATIONS Date :23rdNovember, 2011, it has been held that amendment by Finance Act 2010 would operate retrospectively. The Calcutta High Court, has held in the context of section 40(a)(ia) that the amendment is remedial in nature and designed to eliminate unintended consequences which may cause undue hardship to the taxpayers and is of clarificatory in nature and, therefore, has to be treated as retrospective with effect from 1stApril 2005. In the memorandum explaining the provisions relating to direct taxes in the Finance Bill 2012, in respect of amendment in section 40(a)(ia), it has been stated as under:-*
>
> > *"RATIONALIZATION OF TAX DEDUCTION AT SOURCE (TDS) AND TAX COLLECTION AT SOURCE (TCS) PROVISIONS*
> > *I……..*
> > *II……."*

Further, the CIT(A) also relying on the following decisions, deleted the addition made by the Assessing Officer.

a) *Rajeev Kumar Agarwal v. Additional Commissioner of Income-tax (2014) 45 taxmann.com 555 (Agra – Trib)*
b) *CIT Vs. Virgin Creations (supra) and COMMISSIONER OF INCOME TAX Vs. Kotak Securities Ltd. (2012) 340 ITR 333 (Bom)*

18. Aggrieved by the order of CIT(A), Revenue is now in appeal before us.

19. Before us, Ld. DR took us through the order of Assessing Officer and further submitted that though the Courts have held the insertion of second proviso to sec.40(a)(ia) of the Act to be declaratory and curative in nature and being retrospective from 1st April, 2005, but at the same time it has also been held that the disallowance u/s 40(a)(ia) of the Act will not be required when the payee has included such amounts in the return of income and has also paid the tax on such income. She submitted that there is no evidence to that effect in the records. She therefore submitted that the matter may be remitted back to the file of Assessing Officer and supported the order of Assessing Officer.

20. The Ld. AR on the other hand reiterated the submissions made before the authorities below andsupported the order of CIT(A).

21. We have heard the rival submissions and perused the material on record. The issue in the present ground is with respect to disallowanceof Rs.4,66,658/- u/s 40(a)(ia) of the Act. Before us, it is Revenue's contention that in the present case there is no evidence placed by assessee

to demonstrate that the amounts which have been paid by assessee to NBFCs and on which no TDS has been deducted by assessee, have been offered by the respective payees in their returns of income and has paid the taxes on such receipts. The aforesaid contention of the Revenue has not been controverted by Ld. AR.

22. We find that the Hon'ble Delhi High Court in the case of CIT Vs. Ansal Land Mark Township P. Ltd. (2015) 377 ITR 635 (Del) has held that disallowance u/s. 40(a)(ia) of the Act is not justified when the payee has filed the return of income and offered the sum received to tax. The relevant observations of Hon'ble High Court reads as under:-

> *"8. It is seen that the issue in these AYs arises in the context of the disallowance by the Assessing Officer of the payment made by the Respondent Assessee to Ansal Properties and Infrastructure Ltd. („APIL") which payment, according to the Revenue, ought to have been made only after deducting tax at source under Section 194J of the Act. Before the ITAT, it was urged by the Assessee that in view of the insertion of the second proviso to Section 40(a) (ia) of the Act, the payment made could not have been disallowed. Reliance was placed on the decision of the Agra Bench of ITAT in ITA No. 337/Agra/2013 (Rajiv Kumar Agarwal v. ACIT) in which it was held that the second proviso to Section 40 (a) (ia) of the Act is declaratory and curative in nature and should be given retrospective effect from 1st April 2005.*
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> *9. It is seen that the second proviso to Section 40(a) (ia) was inserted by the Finance Act 2012 with effect from 1st April 2013. The effect of the said proviso is to introduce a legal fiction where an Assessee fails to deduct tax in accordance with the provisions of Chapter XVII B. Where such Assessee is deemed not to be an assessee in default in terms of the first proviso to sub-Section (1) of Section 201 of the Act, then, in such event, "it shall be deemed that the assessee has deducted and paid the tax on such sum on the date of furnishing of return of income by the resident payee referred to in the said proviso".*

10. It is pointed out by learned counsel for the Revenue that the first proviso to Section 201 (1) of the Act was inserted with effect from 1st July 2012. The said proviso reads as under:

> *"Provided that any person, including the principal officer of a company, who fails to deduct the whole or any part of the tax in accordance with the provisions of this Chapter on the sum paid to a resident or on the sum credited to the account of a resident shall not be deemed to be an assessee in default in respect of such tax if such resident- (i) has furnished his return of income under section 139; (ii) has taken into account such sum for computing income in such return of income; and (iii) has paid the tax due on the income declared by him in such return of income; And the person furnishes a certificate to this effect from an accountant in such form as may be prescribed.*

11. The first proviso to Section 210 (1) of the Act has been inserted to benefit the Assessee. It also states that where a person fails to deduct tax at source on the sum paid to a resident or on the sum credited to the account of a resident such person shall not be deemed to be an assessee in default in respect of such tax if such resident has furnished his return of income under Section 139 of the Act. No doubt, there is a mandatory requirement under Section 201 to deduct tax at source under certain contingencies, but the intention of the legislature is not to treat the Assessee as a person in default subject to the fulfilment of the conditions as stipulated in the first proviso to Section 201(1). The insertion of the second proviso to Section 40(a) (ia) also requires to be viewed in the same manner. This again is a proviso intended to benefit the Assessee. The effect of the legal fiction created thereby is to treat the Assessee as a person not in default of deducting tax at source under certain contingencies.

12. Relevant to the case in hand, what is common to both the provisos to Section 40 (a) (ia) and Section 210 (1) of the Act is that the as long as the payee/resident (which in this case is ALIP) has filed its return of income disclosing the payment received by and in which the income earned by it is embedded and has also paid tax on such income, the Assessee would not be treated as a person in default. As far as the present case is concerned, it is not disputed by the Revenue that the payee has filed returns and offered the sum received to tax.

13. Turning to the decision of the Agra Bench of ITAT in Rajiv Kumar Agarwal v. ACIT (supra) , the Court finds that it has undertaken a thorough analysis of the second proviso to Section 40 (a)(ia) of the Act and also sought to explain the rationale behind its insertion. In particular, the Court would like to refer to para 9 of the said order which reads as under:

> *"On a conceptual note, primary justification for such a disallowance is that such a denial of deduction is to compensate for the loss of*

revenue by corresponding income not being taken into account in computation of taxable income in the hands of the recipients of the payments. Such a policy motivated deduction restrictions should, therefore, not come into play when an assessee is able to establish that there is no actual loss of revenue. This disallowance does deincentivize not deducting tax at source, when such tax deductions are due, but, so far as the legal framework is concerned, this provision is not for the purpose of penalizing for the tax deduction at source lapses. There are separate penal provisions to that effect. Deincentivizing a lapse and punishing a lapse are two different things and have distinctly different, and sometimes mutually exclusive, connotations. When we appreciate the object of scheme of section 40(a)(ia), as on the statute, and to examine whether or not, on a "fair, just and equitable" interpretation of law- as is the guidance from Hon'ble Delhi High Court on interpretation of this legal provision, in our humble understanding, it could not be an "intended consequence" to disallow the expenditure, due to non deduction of tax at source, even in a situation in which corresponding income is brought to tax in the hands of the recipient. The scheme of Section 40(a)(ia), as we see it, is aimed at ensuring that an expenditure should not be allowed as deduction in the hands of an assessee in a situation in which income embedded in such expenditure has remained untaxed due to tax withholding lapses by the assessee. It is not, in our considered view, a penalty for tax withholding lapse but it is a sort of compensatory deduction restriction for an income going untaxed due to tax withholding lapse. The penalty for tax withholding lapse per se is separately provided for in Section 271 C, and, section 40(a)(ia) does not add to the same. The provisions of Section 40(a)(ia), as they existed prior to insertion of second proviso thereto, went much beyond the obvious intentions of the lawmakers and created undue hardships even in cases in which the assessee's tax withholding lapses did not result in any loss to the exchequer. Now that the legislature has been compassionate enough to cure these shortcomings of provision, and thus obviate the unintended hardships, such an amendment in law, in view of the well settled legal position to the effect that a curative amendment to avoid unintended consequences is to be treated as retrospective in nature even though it may not state so specifically, the insertion of second proviso must be given retrospective effect from the point of time when the related legal provision was introduced. In view of these discussions, as also for the detailed reasons set out earlier, we cannot subscribe to the view that it could have been an "intended consequence" to punish the assessees for non deduction of tax at source by declining the deduction in respect of related payments, even when the corresponding income is duly brought to tax. That will be going much beyond the obvious intention of the section. Accordingly, we hold that the insertion of second proviso to Section 40(a)(ia) is declaratory and curative in nature and it has

retrospective effect from 1st April, 2005, being the date from which sub clause (ia) of section 40(a) was inserted by the Finance (No. 2) Act, 2004."

14. The Court is of the view that the above reasoning of the Agra Bench of ITAT as regards the rationale behind the insertion of the second proviso to Section 40(a) (ia) of the Act and its conclusion that the said proviso is declaratory and curative and has retrospective effect from 1st April 2005, merits acceptance.

15. In that view of the matter, the Court is unable to find any legal infirmity in the impugned order of the ITAT in adopting the ratio of the decision of the Agra Bench, ITAT in (Rajiv Kumar Agarwal v. ACIT)."

In view of the aforesaid facts, we find force in the contention of Ld. DR. We therefore, restore the issue back to the file of Assessing Officer to decide the issue afresh about the disallowance in line with the aforesaid decision of Hon'ble Delhi High Court (supra) and in accordance with law. The assessee is also directed to file the requisite details called for by the authorities. The Assessing Officer shall grant adequate opportunity of hearing to the assessee. Thus, **the ground No.3 of Revenue is allowed for statistical purposes.**

23. The ground No.4 is with respect to deleting the addition of Rs.1,90,81,660/- on account of service tax collected but not deposited.

24. During the course of assessment proceedings, the Assessing Officer on perusing the tax audit report noted that the assessee had received service tax of Rs.1,56,43,603/- but was not deposited with the Department. He also noticed that the assessee had deposited service tax

which also included service tax of earlier years. The assessee was asked to explain as to why service tax liability of the year under consideration not be added to the total income as it was not deposited before the due date of filing the return of income, to which the assessee made submissions which were found not acceptable to the Assessing Officer. The Assessing Officer was of the view that service tax amount which had remained unpaid was the business income of the assessee u/s 28 of the Act and was to be disallowed on account of non-payment. He accordingly, made the addition of Rs.1,90,81,666/- by applying provisions of sec.43B of the Act. Aggrieved by the order of Assessing Officer, assessee carried the matter before the CIT(A). The CIT(A) after considering the submissions of assessee deleted the addition made by Assessing Officer by observing as under:-

> *"25. I have gone through the assessment order and submissions of the appellant. The controversy in this ground of appeal revolves around the disallowance of service tax under the provisions of section 43B of the Act. Before deciding the issue in hand, it is imperative to advert to the actual background of the case, the appellant submits that it is engaged in the business of providing Engineering services to Power and Cement industries, the appellant raises bills (including service tax) and after verification and approval of such bills by the customers, payments are released. It is seen that the appellant is preparing his accounts on accrual basis wherein it has to recognise for the income/revenue in respect of work done at the time of raising invoices irrespective of realization/ receipts thereof till which time, the same are appearing under "Sundry Debtors" in the financial statements. Undisputedly, the amount of Rs.1,90,81,666/- represents the element of Service Tax and not part of appellant's revenue by any stretch of imagination. On a careful consideration of the entire material on record and factual matrix and matter in dispute, I find that though invoices (including service tax element) have been raised by the appellant in respect of work executed and further the appellant, though, has accounted for such revenue as income and the attached service tax element as a liability in its financial statements so as to comply with the accounting norms, the nature of sum of Rs.1,90,81,666/- remains the same i.e.'service tax'. The observation of the*

A.Oin the assessment order that Service tax is linked with revenue and taxable u/s 28 is therefore, perverse and contrary to the irrefutable material available on record and further, the tangible submissions made by the appellant during the course of assessment proceedings that the service tax though billed but has not been debited to Profit &Loss A/c nor credited to Profit Loss A/c have not been properly appreciated by him. Further, the appellant has fervently relied upon the provisions of the Finance Act 1994 governing Service Tax and Service Tax Rules 1994 to contend that service tax is not in the nature of income. Section 66 of Chapter V of the Finance Act 1994 governing service tax is the charging section for levy of service tax, section 68 of the said Act determines the manner in which payment of service tax has to be made and furtherRule 6(1) of the Service Tax Rules 1994 prescribes the manner of payment of service tax as "The service tax shall be paid to the credit of Central government .....immediately following the calendar month in which the payments are received towards the value of taxable services. On a succinct analysis of the aforesaid provisions as they stood at the relevant time, it is explicitly clear that Service Tax is an indirect tax and cannot be characterized as income of the appellant. This brings me to the next step viz. the interpretation of the provisions of section 43B of the Act vis-à-vis statutory liability of Service Tax,provisions of section 43B of the Act read as "Notwithstanding anything contained in any other provision of this Act, adeduction otherwise allowable under this Act in respect of any sum payable by the assessee by way of tax, duty, cess or fee, by whatevername called under any law for the time being in force...." i.e. in order to attract disallowance, such sum should have been debited to Profit & Loss A/c. The inclusion of service tax element as income is clearly vitiated and corresponding disallowance made by the A.O as regards liability of Service Tax in the present case, when examined on the touchstone of the said conclusion, deserves to be deleted since, at the first stage, service tax cannot be construed as income nor the appellant has credited it to Profit & Loss A/c and no deduction has been claimed by debiting Profit & Loss A/c and consequentially, the same could not attract disallowance under the provisions of Section 43B of the Act. The decisions in the case of ACIT vs. Real Image Media Technologies (P) Ltd. 116 TTJ 964 (ITAT Mum.) & in the case of Pharma Search Vs. ACIT 53 SOT 1 (ITAT Mum.) fortifies the said view.

26. Further, the disallowance made by the A.O deserves to be deleted on one more aspect that since the appellant is accounting for the Service Tax liability under separate Account therefore, it has not claimed any deduction of service tax nor did it debit the same as an expenditure in the Profit & Loss Account, hence, the same could not be disallowed u/s 43B of the Act. The judgment of the Hon'ble High Court of Delhi in the case of CIT Vs. Noble & Hewitt (India) (P) Ltd. 305 ITR 324 fortifies the said view. The case of the appellant also finds support from the following decisions:

(i) Ind Global Corporate Finance Pvt. Ltd. vs. ITO (2012) 33 CCH 388 (ITAT Mumbai);

(ii) DCIT vs. Ovira Logistic Pvt. Ltd. (2012) 34 CCH 310 (ITAT Mumbai);

(iii) DCIT vs. Hathway Cable &Datacom (P) Ltd. I.T.A. No.5757/M/2011 dated 05.09.2012 (ITAT Mumbai);

27. In view of the above factual and legal matrix, I am of the considered opinion that the addition of Rs.1,90,81,666/- on account of Service Tax u/s 28 and corresponding disallowance under the provisions of Section 43B of the Act is unjustified and not sustainable ***and hence, deleted.***

25. Aggrieved by the order of CIT(A), Revenue is now in appeal before us.

26. Before us, Ld. DR supporting the order of Assessing Officer submitted that while deciding the issue Ld. CIT(A) has ignored the fact that the assessee has routed the service tax amount through the Profit & Loss Account and in support of which she pointed to the Profit & Loss Account filed by the assessee and also the return of income.

27. The Ld. AR on the other hand reiterated the submissions made before the authorities below and further submitted that the issue is also covered in assessee'sfavour by the decision of Tribunal in assessee's own case for A.Y. 2009-10 in ITA No.174/BPR/2012, order dated 12.02.2016. He also placed on record the copy of the aforesaid decision. He thus, supported the order of CIT(A). He further submitted that the contention of Revenue of having routed service tax through the P & L A/c is incorrect as the same has been in the first instance included in gross receipts and

thereafter reduced from the receipts and the same is not therefore considered in the P & L A/c. He further submitted that merely for the purpose of disclosure the service tax amount is shown and has not been considered for arriving at the income of the assessee.

28. The Ld. DR in the rejoinder submitted that on the issue of service tax, against the order of ITAT for earlier year, Revenue has preferred an M.A. Thereafter, a query was raised by the Bench about the fate of M.A. to which it was submitted that the same has not yet been listed for hearing.

29. We have heard the rival submissions and perused the material on record. The issue in the present ground is with respect to deletion of addition of Rs.1,90,81,660/- made by Assessing Officer u/s. 43B of the Act. We find that while deleting the addition CIT(A) has given finding that though service tax was billed but was not debited to Profit & Loss Account, no deduction was claimed for the service tax by the assessee. We further find that the Co-ordinate Bench of Tribunal by relying on the decision in the case of ITO Vs. Sri Tapan Das, Prop. M/s. Amkey Construction in ITA No.150/BLPR/2012, order dated 04.12.2015 had on similar issue in assessee's own case deleted the addition made by the Revenue by observing as under:

> *"5. With this brief background, we have heard both the sides. At the outset, it is worth to mention that this issue had already been considered by us in the case of ITO vs. Sri Tapan Das, Prop. M/. Amkey Construction in ITA*

No.150/BLPR/2012 order dated 4.12.2015, wherein, we have discussed the law pronounced on it and thereafter held as under:

> *"4. Hence, after referring to the case laws namely S. B. Foundry (1990) 185 ITR 555 (All.)and India Carbon Ltd. Vs IAC &Anr. (1993) 200 ITR 759 (Gau) it was held that the admitted factual position was that the assessee had not claimed any amount by way of service tax as a deduction, therefore, there was no question of disallowance of any tax or dues u/s 43B of the IT Act. Against the relief, as granted by the learned CIT (A), now, the Revenue is in appeal before us.*
>
> *5. On the date of hearing, no one was present from the side of the respondent assessee. From the side of the Revenue, learned DR Smt. Shital S. Verma appeared and supported the order of the AO.*
>
> *6. After considering the submissions of the learned DR, we are of the considered opinion that no interference is required in the decision given by the learned CIT (A). The issue of disallowance of unpaid statutory liability as prescribed u/s 43B of the IT ACT now stood resolved by several decisions. The impact of Circular No.372 dated 8th December, 1981 has also been considered. As per the said circular it is specifically mentioned that several cases have come to the notice where tax payers did not discharge their liability in respect of excise duties or other taxes although claimed, the said liability as deduction on the ground that the accounts have been maintained on mercantile basis. The CBDT has observed that on one hand the tax payers have claimed the deduction merely on the basis of accrual of liability but on the other hand, disputed the liability and did not discharge the obligation of payment of the tax. For some reasons or the other, the liability is disputed and not paid. This aspect has been considered by several Courts and came to the conclusion that in a situation when deduction has not been claimed and a separate account has been maintained, then disallowance u/s 43B of the IT Act should not be made. In the case of CIT Vs Noble & Hewitt (India) (P) Ltd. (2008) 305 ITR 324 (Del.), the case of Chowringhee Sales Bureau P. Ltd. Vs CIT (1977) 110 ITR 385 (Cal.) has been distinguished and it was held that when the amount of tax has not been debited to profit & loss account as an expenditure nor claimed any deduction in respect of the said amount then, the question of disallowance u/s 43B of the IT Act does not arise. Respectfully, following this decision, we hereby hold that there was no fallacy in the view taken by the learned CIT (A). The same is hereby confirmed and ground No.1 of the appeal of the Revenue is, therefore, dismissed."*

30. Before us, it is also the contention of Revenue that on the issue of service tax that has been decided in assessee's own case for earlier year by

the Tribunal an M.A. has been preferred. We find that no order has been passed on the M.A. whereby the original order of the Tribunal has been recalled by the Tribunal. In such a situation, we are of the view that the original order of the Tribunal for earlier year is a valid order and in that case the Tribunal on identical facts, has decided the issue in favour of assessee.

31. We further find that Hon'bleDelhi High Court in the case of CIT Vs. Noble & Hewitt (India) (P) Ltd. (2008) 305 ITR 324 (Del) has held that when assessee has not debited the amount of service tax to the P & L A/c and has not claimed it as expenditure, the question of disallowance does nor arise. Before us, the Revenue has not placed any contrary binding decision in its support. In view of this, we find no reason to interfere with the order of CIT(A) and thus, **the ground No.4 of Revenue is dismissed.**

32. In the result, **the appeal of Revenue is partly allowed for statistical purposes.**

ITA No.318/RPR/2014
A.Y. 2011-12

33. The ground No.1 is with respect to deleting the addition of Rs.1,04,26,385/- by the CIT(A).

34. This issue is identical to the issue raised in ground No.4 in ITA No.222/RPR/2014. Since the facts in the year under consideration being

identical to that of A.Y. 2010-11, our decision in ITA No.222/RPR/2014 shall apply *mutatis mutandis* to this issue. **Thus,the ground No.1raised by the Revenue is dismissed.**

35. The ground No.2 is with respect to deletion of disallowance u/s. 40(a)(ia) of the Act at Rs.10,68,722/-.

36. This issue is identical to the issue raised in ground No.3 in ITA No.222/RPR/2014. Since the facts in the year under consideration being identical to that of A.Y. 2010-11, our decision in ITA No.222/RPR/2014 shall apply *mutatis mutandis* to this issue. **Thus,the ground No.2raised by the Revenue is allowed for statistical purposes.**

37. In the result, **the appeal of Revenue is partly allowed for statistical purposes.**

38. In the combined result, **both the appeals of Revenue are partly allowed for statistical purposes**.

Order pronounced on 8th day of November, 2019.

Sd/-	Sd/-
PARTHASARATHI CHAUDHURY	**ANIL CHATURVEDI**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

रायपुर/ RAIPUR ; दिनांक / Dated :8th November, 2019.
GCVSR

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

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. The CIT(A), Raipur
4. The CIT, Raipur
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण,रायपुरबेंच, रायपुर / DR, ITAT, Raipur Bench, Raipur.
6. गार्ड फ़ाइल / Guard File.

आदेशानुसार / BY ORDER,

//True Copy//

Senior Private Secretary
आयकरअपीलीयअधिकरण, रायपुर/ ITAT, Raipur.

		Date	
1	Draft dictated on	07.11.2019	Sr.PS/PS
2	Draft placed before author	08.11.2019	Sr.PS/PS
3	Draft proposed and placed before the second Member		JM/AM
4	Draft discussed/approved by second Member		AM/JM
5	Approved draft comes to the Sr. PS/PS		Sr.PS/PS
6	Kept for pronouncement on		Sr.PS/PS
7	Date of uploading of order		Sr.PS/PS
8	File sent to Bench Clerk		Sr.PS/PS
9	Date on which the file goes to the Head Clerk		
10	Date on which file goes to the A.R		
11	Date of dispatch of order		