

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'E' NEW DELHI**

**BEFORE SH. G. S. PANNU, VICE PRESIDENT
AND
MS SUCHITRA KAMBLE, JUDICIAL MEMBER**

I.T.A. No. 3345/DEL/2015 (A.Y 2010-11)

Vikon Engineering Pvt. Ltd., 31, First Floor, Sunder Nagar, New Delhi. (PAN : AABCV 7701 K) (APPELLANT)	Vs	ACIT, Centre Circle – 5, New Delhi (RESPONDENT)
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Appellant by	Sh. Saurabh Rastogi, C.A.
Respondent by	Ms. Rakhi Vimal, Sr. D.R.

Date of Hearing	12.12.2019
Date of Pronouncement	31.12.2019

ORDER

PER SUCHITRA KAMBLE, JM

This appeal is filed by the assessee against the order of the Commissioner of Income Tax [Appeals]-24, New Delhi dated 26.03.2015 for Assessment Year 2010-11.

2. The Revised Ground of appeal are as under:
1. *“That under the facts and circumstances of the case the addition of Rs.49,42,905/- in computation of business profits due to disallowance of service tax payable under section 43B is not justified in law as well as on merits.*
 - 2.1. *That under the facts and circumstances of the case, the disallowance u/s 14A of Rs.6,64,271/- is absolutely illegal an unwarranted.*
 - 2.2 *That under the facts of the case, no disallowance should have been made u/s 14A as the exempt income is NIL.”*

3. During the year under consideration, the assessee company received rent from factory building and interest from advances to NBFC. The assessee company filed its return of income for the Assessment Year 2010-11 on 28.09.2010 declaring total income at Rs. 3,73,34,500/-. The notice under Section 143(2) of the Income Tax Act, 1961 dated 15.09.2011 was served to the Assessee company. The assessment was completed on 31.03.2012 under Section 143(3) of the Act at total income of Rs. 4,91,35,889/-. The Assessing Officer made following additions while passing assessment order dated 31.03.2013:

- (i) Addition of Rs.23,280/- on account of rates and taxes.
- (ii) Disallowance of Rs.1,10,300/- u/s 40(a)(ia).
- (iii) Disallowance of Rs.49,42,905/- u/s 43B.
- (iv) Disallowance of Rs.6,64,271/- u/s 14A.
- (v) Disallowance of Rs.60,60,633/- on account of proportionate interest.

4. Being aggrieved by the assessment order the assessee filed an appeal before the CIT(A). The CIT(A) partly allowed the appeal of the assessee.

5. As regards Ground No.1 relating to disallowance of Rs.49,42,905/- u/s 43B, the Ld. AR submitted that the assessee company is maintaining its books of account on accrual basis. As the assessee is also a company, the service tax is payable on the 5th day of every month immediately following the said calendar month. The company has paid the service tax on amounts realized up to 31.03.2010. Thus, the Ld. AR submitted that no disallowance is warranted on the service tax payable shown on outstanding as on 31.03.2010. The Ld. AR submitted that Section 43B would be attracted only to a case where an item is allowable as deduction, but because of the failure on part of any assessee to make such payment, such deduction would not be allowed. But this is not the case of the assessee herein. The Ld. AR submitted that Section 43B might be applicable to the case of sales-tax or excise duty, but the same could not be said to be the position in assessee's case relating to service tax. The Ld. AR submitted that the assessee never allowed deduction on account of service tax which is collected on behalf of the Government and is paid to the Government

account, 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 have been made. Further, the Ld. AR submitted that Section 43B(c) uses the expression 'any sum payable'. The Ld. AR submitted that for making any disallowance, first of all, it has to be established that such sum is payable. The word 'payable' used in Section 43B means that there is a kind of obligation on the part of payee to make the payment which is already due. A plain reading of Rule 6 of the Service Tax Rules would show that service provider becomes liable to make the payment of service tax by the 5th day of the month immediately following the calendar month in which the payments are received towards the value of taxable service. Thus the liability arises to make the payment only after the service provider has received the payments. 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'. In the instant case, since service tax was not payable by the assessee, the provision of Section 43B could not be applied. The Ld. AR relied upon the decision of Tribunal in case of DCIT vs. M/S Padinjarekara Agencies Ltd. 53 ITD 317 and ITO vs. Sigma Information System (ITA No.5232/Del/2016 order dated 27/04/2017) as well as relied upon the Hon'ble Delhi High Court decision in case of CIT vs. Noble and Hewitt (I) Pvt. Ltd. 305 ITR 324.

6. The Ld. DR submitted that the Assessing Officer and the CIT(A) both rightly upheld the disallowance under Section 43B of the Act because the assessee company has created account for the service tax in the books of accounts but shown as payable and no documentary evidence was submitted as proof of payment of service tax before the Revenue authorities. The Ld. DR relied upon the Assessment Order and the order of the CIT(A).

7. We have heard both the parties and perused all the relevant materials available on records. It is pertinent to note that the assessee has never allowed deduction on account of service tax. The income was from the house property and Section 43B is applicable to income from business and not applicable to that of income from house property. From the records, it can be seen that the assessee before the Assessing Officer as well as before the CIT(A), filed the original income tax return giving all the details of income from house property along with profit and loss account / balance sheet. The decision of the Hon'ble Delhi High Court in the case of Noble & Hewitt (supra) would apply wherein it is held that since the assessed did not debit the amount to the Profit & Loss Account as an expenditure nor did the assessee claimed any deduction in respect of the amount and considering that the assessed is following the mercantile system of accounting, the question of disallowing the deduction not claimed would not arise. In the case before us, the assessee has not routed the service tax through the P&L A/c and has not claimed it as a deduction. Therefore, the Assessing Officer was not right in applying Section 43B of the Act in assessee's case and hence the addition made by the Assessing Officer does not survive. Ground No.1 is allowed.

8. As regards Ground No.2.1 & 2.2, the Ld. AR submitted that disallowance u/s 14A of the Income Tax Act is not at all warranted because there is no exempt income claimed by the assessee. In fact, the income was derived only from house property and there is no other investment. The Ld. AR relied upon the decision of the Hon'ble Delhi High Court in case of Cheminvest Limited vs. CIT 378 ITR 33 as well as subsequent decision of the jurisdictional High Court in case of PCIT vs. M/s. Oil Industry Development Board (ITA No.197/2018 order dated 16.02.2018) which was subsequently affirmed by the Hon'ble Apex Court in SLP Diary No(s). 2755/2019 order dated 08.02.2019 relying upon Hon'ble Apex Court decision in case of CIT vs. Essar Teleholdings Ltd. (2018) 3 SCC 253.

9. We have heard both the parties and perused all the relevant materials available on record. There is no exempt income claimed by the assessee as there is only income from house property in the present assessment year and no other investment was made by the assessee. This is reflected in the profit and loss account, therefore, as per the decision of the Hon'ble Jurisdictional High Court in case of Cheminvest Limited and subsequently that of M/s. Oil Industry Development Board (supra), Section 14A disallowances is not just and proper. Ground No.2.1 and 2.2 are allowed.

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

Order pronounced in the Open Court on 31st day of December, 2019.

Sd/-

**(G. S. PANNU)
VICE PRESIDENT**

Sd/-

**(SUCHITRA KAMBLE)
JUDICIAL MEMBER**

Dated: 31/12/2019
*Priti Yadav, Sr. PS **

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR

ITAT NEW DELHI

Date of dictation	12.12.2019
Date on which the typed draft is placed before the dictating Member	12.12.2019
Date on which the typed draft is placed before the Other Member	31.12.2019
Date on which the approved draft comes to the Sr. PS/PS	31.12.2019
Date on which the fair order is placed before the Dictating Member for pronouncement	31.12.2019
Date on which the fair order comes back to the Sr. PS/PS	31.12.2019
Date on which the final order is uploaded on the website of ITAT	31.12.2019
Date on which the file goes to the Bench Clerk	31.12.2019
Date on which the file goes to the Head Clerk	