IN THE INCOME TAX APPELLATE TRIBUNAL
COCHIN BENCH, COCHIN
BEFORE S/SHRI CHANDRA POOJARI, AM & GEORGE GEORGE K., JM

I.T.A. No. 653/Coch/2019 & 04/Coch/2020
Assessment Years: 2012-13 & 2014-15

The Assistant Commissioner of Income-tax, Corporate Circle-1(2), Kochi	**Vs.**	M/s. Kunnel Engineers & Contractors (P) Ltd., 3rd Floor, Puthuran Plaza, M.G. Road, KPCC Junction, Kochi-682 011. [PAN: AABCK 6154B]
(Revenue -Appellant)		**(Assessee -Respondent)**

Revenue by	Shri Mritunjaya Sharma, Sr. DR
Assessee by	Shri Allen Joseph & Shri Reuben Joseph, CAs

Date of hearing	12/03/2020
Date of pronouncement	19th/05/2020

O R D E R

Per CHANDRA POOJARI, AM:

These two appeals filed by the Revenue are directed against the different orders of the CIT(A)-I, Kochi and pertain to the assessment years 2012-13 and 2014-15.

1.1 Since the issues involved in these appeals were common, they were heard together and are being disposed off by this common order.

2. The Revenue has raised the following common grounds of appeals except for variation in figures:

1. The orders of the Commissioner of Income Tax (Appeals)-I, Kochi are opposed to the facts and circumstances of the case.

2. The learned Commissioner of Income Tax (Appeals) is not justified in deleting the addition of Rs,3,52,69,463/- being the disallowance of unpaid service tax u/s 43B of the IT Act.

3. The Commissioner of Income Tax (Appeals) ought to have considered the fact that, when Section 43B(a) speaks of the sum payable by way of tax etc; the said provision is dealing with the amounts payable to the sovereign qua sovereign, but not the amounts payable to the sovereign qua principal. The decision relied on by the CIT(A) was on the issue of amounts payable to the sovereign qua the principal while in the case on hand the amount is payable to the sovereign without any reference to the assessee as principal.

4. The CIT(A) failed to consider that in the case law relied on by the CIT(A) the amount in question is not an amount payable by the assessee qua tax but the amount collected by the assessee as the agent of the State of Kerala towards the tax payable by the consumer of electricity to the State of Kerala.

5. The CIT(A) failed to consider that the liability to pay and the corresponding authority of the State to collect the tax (flowing from a statute) is essentially in the realm of the rights of the sovereign. Whereas the obligation of the agent to account for and pay the amounts collected by him on behalf of the principal is purely fiduciary. The nature of the obligation continues to be fiduciary even in a case wherein the relationship of the principal and agent is created by a statute.

6. The CIT(A) failed to consider the facts and circumstances of the case that the decision of the Hon'ble High Court of Kerala in KSEB Vs. DCIT reported in 329 ITR 91 is applicable to statutory bodies such as electricity board where the relationship is that of principal and agent, which cannot have application to entities like the assessee, M/s Kunnel Engineers & Contractors P Ltd.

7. The CIT(A) failed to consider the fact that the land is not an asset on which depreciation can be claimed, as the assessee has claimed depreciation on undivided share of land treating them as cost paid towards building.

8. The CIT(A) ought to have considered the fact that the onus to establish the linkage between the borrowed funds and the interest free loans to the sister concerns lies on the assessee.

9. It is prayed that the orders of the learned Commissioner of Income Tax (Appeals)-I, Kochi be reversed and that of the Assessing Officer restored.

10. For these and other grounds that may be urged at the time of hearing, it is prayed that the order of the Commissioner of Income Tax(Appeals) may be set aside and that of the Assessing Officer restored.

ITA No. 653/Coch/2019: AY 2012-13

3. The first common ground of the Revenue is with regard to deleting the addition of Rs,3,52,69,463/- being the disallowance of unpaid service tax u/s 43B of the IT Act.

3.1 The facts of the case for the assessment year 2012-13 are that an amount of Rs.6,83,90,211/- for the assessment year 2012-13 pertaining to service tax payable was included under statutory payables appearing against other outstanding liabilities forming part of the balance sheet as on 31/03/2012. In the tax audit report against the column relating to section 43B is given as 'Nil' and no break-up of date wise payment has been attached. During the assessment proceedings it was clarified that the break-up of Rs.6,83,90,211/- consists of service tax payable for the year ended 31/03/2011, Rs.3,31,20,748/- and for the year ended 31.3.2012 Rs.3,52,69,453/-. The Assessing Officer noticed that these amounts have not been paid before respective due dales of filing of return for A.Y- 2011-12 and A.Y. 2012-13 as required by section 43B of the Income Tax Act. It was clarified that the assessee was not routing the service tax collected by it through the profit & loss account and instead it is directly shown as an outstanding liability in the balance sheet. The assessee therefore, contended that section 43B was not applicable since

43B deals with items debited in P&L account and claimed as a deduction. The assessee also relied on the judgment of the Delhi High Court in the case of CIT Vs. Noble and Hewitt India Pvt. Ltd. (305 ITR 324) and the decision of the ITAT Chennai in the case of Real Image Media Technology Pvt. Ltd. (2008) (114 ITD 573). The Assessing Officer rejected the claim of the assessee. The Assessing Officer relied on the judgment of the Allahabad High Court in the case of Jagdish Prasad Nigam Vs. CIT (1997) (228 ITR 112), wherein it was held that excise duty collected from customers as part of price of goods will have to be treated as trading receipts and brought to tax following the judgment of the Supreme Court in the case of Chowranghee Sales Bureau Pvt. Ltd. Vs. CIT (87 ITR 542). According to the Assessing Officer, the service tax is also a trading receipt as it is a part of the price for services imposed by statutory provision. Moreover, the service tax collected by the assessee does not belong to it and it is to be paid to the treasury within the time allowed and the principle of diversion by overriding title applies to it. Therefore, when the assessee fails to deposit the same, the principle laid down that it shall form part of the receipt of the assessee cannot be nullified by accounting it without routing through its profit & loss account. Hence, the amount of Rs. 3,52,69,463/- being unpaid service tax was added to the income of the assessee by invoking the provisions of section 43B of the I.T. Act.

3.2 On appeal, the CIT(A) observed that assessee was following mercantile system of accounting. The CIT(A) observed that the assessee did not deposit part of

Service Tax collection with the concerned authorities and the assessee neither claimed any deduction in this regard nor did it debit said amount as an expenditure in Profit & Loss Account. According to the CIT(A), the assessee had credited the Service Tax Recoverable from client to a liability account. Hence, relying on the judgment of the Delhi High Court in the case of CIT vs. Noble and Hewitt (I) Pvt. Ltd. (supra), the CIT(A) observed that the question of disallowing the deduction not claimed would not arise. The CIT(A) relied on the decision of the ITAT, Chennai in the case of ACIT vs. Real Image Media Technologies (P) Ltd (2008) (114 ITD 573), wherein facts were distinguished from the decision of Calcutta High Court in the case of Chowranghee Sales Bureau Ltd. vs. CIT (1977) (110 ITR 385), wherein it was held that sales tax is a part of trading receipt, whereas Service Tax is not. The CIT(A) also placed reliance on the judgment of the Kerala High Court in the case of Kerala State Electricity Board vs. DCIT (329 ITR 91), wherein the High Court stated "we are of the opinion that, when section 43B(a) speaks of the sum payable by way of tax etc., the said provision is dealing with the amounts payable to the sovereign, but not amounts payable to the sovereign qua principal. We are therefore of the opinion that Section 43B cannot be invoked in making the assessment of the liability of the appellant under the Income Tax Act with regards to the amounts collected by the appellant pursuant to the obligation cast on the appellant under section 5 of the Electricity Duty Act, 1963." Applying the same logic, in the instant case, the CIT(A) held that liability of Service Tax payable cannot be disallowed as the same was not claimed by the assessee as an expense. Thus, relying on the judgment of the Kerala

High Court and the order passed by the ITAT, Cochin in ACIT vs. Kerala State Electricity Board [2018] 100 taxmann.com 132 (Cochin Trib.), wherein the Tribunal followed the order of the Kerala High Court, the CIT(A) deleted the disallowance of service tax payable for both the assessment years.

3.3 Against this, the Revenue is in appeal before us. The Ld. DR submitted that ITAT, Ahmedabad upheld disallowance u/s. 43B on unpaid service tax for AY 2006-07 in the case of electricity transmission company and rejected the assessee's stand that since service tax payable was not reflected in the profit and loss account and was only shown as liability in the balance sheet for tracking the tax payable as assessee was acting as a mere collecting agent, section 43B disallowance was not applicable. The Tribunal observed that the assessee had charged service tax from its customers on the services rendered and tax charged was not paid to the credit of government, and that section 43B(a) was enacted for such taxes remaining payable at the year-end and are still not paid before the due date of filing of return. The Tribunal clarified that "Sec. 43B sub-sec. (a)…. does not have a direct link of the amount of tax to be passed through P&L account. Rather it is in the nature of "check" by the statute to ensure that the assessee makes payment of tax collected to the concerned department and if he is unable to do so the amount is added to its income". The Tribunal distinguished assessee's reliance on the judgment of Bombay High Court in the case of Ovira Logistics (P) Ltd. and held that in the present cae there is no bifurcation of whether service tax payable was in relation to those

services on which the amount due from customers was not received. The Ld. DR relied on the judgment of the Supreme Court in the case of Maruti Suzuki India Ltd. vs. CIT (114 taxmann.co, 129).

3.4 The Ld. AR submitted that the assessee had not remitted service tax dues amounting to Rs.3,52,69,463/- for the assessment year 2012-13 and Rs.2,42,72,852/- for the assessment year 2014-15 which was recognised as a liability in its books and this amount was not remitted before the due date of filing return of income under section 139(1) of the Income Tax Act due to shortage of funds. However, the Ld. AR submitted that the amount was remitted during the subsequent assessment year. The Ld. AR submitted that the service tax dues were not routed through the profit and loss account but directly through the balance sheet by recognising the entire amount as a liability once an invoice is raised on the assessee's customer. It was submitted that no portion of service tax was claimed as an expense either during the subject assessment years or in previous assessment years. This treatment of accounting is also in line with the accounting standards and accounting norms recognised by the erstwhile Companies Act, 1956. The Ld. AR referred to the relevant portions of section 43B as follows:

> *43B - Notwithstanding anything contained in any other provision of this Act, a deduction otherwise allowable under the Act in respect of—*
>
> *(a) any sum payable by the assessee by way of tax duty, cess or fee, by whatever name called, under any law for the time being in force, or]*

(b) any sum payable by the assessee as an employer by way of contribution to any provident fund or superannuation fund or gratuity fund or any other fund for the welfare of employees, or

(c) any sum referred lo in clause (ii) of sub-section (1) of section 36, or

(d) any sum payable by the assesses as interest on any loan or borrowing from any public financial institution or a Slate financial corporation or a State industrial investment corporation, in accordance with the terms and conditions of the agreement governing such loan or borrowing.

(e) any sum payable by the assesses as interest on loan or advances from a scheduled bank or a co-operative bank other than a primary agricultural credit society or a primary cooperative agricultural and rural development bank in accordance with the terms and conditions of the agreement governing such loan or advances, or

(f) any sum payable by the assessee as an employer in lieu of any leave at the credit of his employee, or

(g) any sum payable by the assessee to the Indian Railways for the use of railway assets,
shall be allowed (irrespective of the previous year in which the liability to pay such sum was incurred by the assessee according to the method of accounting regularly employed by him only in computing the income referred to in section 28 of that previous year in which such sum is actually paid by him

3.5 The Ld. AR submitted that from a plain reading of section 43B it is apparent that the deductions are available to an assessee only when it is a deduction otherwise allowable under the Act. In the present case, it was submitted that service tax was not claimed by the assessee as a deduction in the first place for it to be disallowed on account of non-payment. According to the Ld. AR, the correct interpretation of the expression "otherwise allowable" is that the item claimed as deduction needs to be an expenditure allowable under the provisions of the Income-tax Act in computing the income and the implication of the expression is that those items of expenditure which are not usually deductible in computing the income of an

assessee cannot be claimed as deduction even if the assessee has made actual payments of those items. The expression "a deduction otherwise allowable" is used in a general and permissive manner as explained above. The Ld. AR submitted that the assessee was following mercantile system of accounting and did not deposit any part of service tax collections with concerned authorities. According to the Ld. AR the assessee neither claimed any deduction in this regard nor did it debit said amount as an expenditure in profit and loss account. The assessee had credited the service tax recoverable from client to a liability account. Hence, the question of disallowing the deduction not claimed would not arise. The Ld. AR submitted that in the case of KSEB vs. DCIT (322 ITR 9), the amount collected by the assessee is as an agent of the state. Further, according to the Ld. AR, service tax is similar in nature to electricity duty and it is collected from customers for further remittance to the government. In both the cases, the Ld. AR submitted that the assessee is merely acting as an agent of the government to ensure collections. The Ld. AR submitted that the principal gent relationship is very well established from the context of service tax. He relied on the judicial pronouncements which have been reiterated earlier.

4. We have heard the rival submissions and perused the record. In this case, the assessee has collected an amount of Rs. Rs.3,52,69,463/- for the assessment year 2012-13 and Rs.2,42,72,852/- for the assessment year 2014-15 as service tax and not remitted the same to the Government exchequer, before the due date of filing

of the return of income. As such, the issue whether the provisions of section 43B of the I.T. Act applies to service tax, which is not paid before the due date of filing of the return. It was considered by the co-ordinate Bench of the ITAT, Hyderabad Benches in the case of M/s. Bartronics India Ltd. v. ACIT [ITA No.2188 and 2189/Hyd/2011 vide order dated 31.05.2012 that when the assessee has not paid the service tax as required under the provisions of section 43B, which is also very much covered u/s 43B of the I.T. Act. The provisions of section 43B of the Act is very clear and it states that "any sum payable by the assessee by way of tax, duty, cess or fee, by whatever name called, under any law for the time being in force". Therefore, even the service tax is liability which covers u/s 43B of the Act and non-payment of the same within the stipulated time as specified u/s 43B of the Act attracts disallowance. Now the question is that when the assessee has not claimed it as expenditure in the profit and loss account, could it be disallowed u/s 43B of the Act. This was considered by the Hon'ble Apex Court in the case of Chowranghee Sales Bureau P. Ltd. v. CIT [(1973) 87 ITR 542 (SC)], in which it was held that the sales tax collected by the assessee is revenue receipt even if it is shown by the assessee under non-revenue head and such treatment by the assessee is not decisive. Further, in the case of M/s. Jain Christopher v. DCIT in ITA No.855/Bang/2012 – order dated 12.04.2013, it was held as under: -

> *"7.2 During the course of assessment proceedings, the Assessing Officer observed that a sum of Rs.29 lakhs representing service tax collected by the assessee had not been paid, but, was shown as 'outstanding liability'. Being queried, it was explained that it had not preferred any claim for deduction and, thus, it was argued, the question of disallowance u/s 43B of the Act does not arise. The AO took a view that even though the assessee had not*

claimed the same in its P & L account as an expenditure and, therefore, section 43B has no application. However, he was of the view that the fact remains that service tax collected by the assessee but not paid to the Government account up-to the end of the financial year or even up-to the date of filing of the return of income and, thus, by not including this amount in its service, it had clearly made a claim indirectly. As rightly highlighted by the CIT(A), the assessee's plea that sales-tax was different from service tax cannot be accepted in the present circumstance as what the assessee was a firm of Chartered Accountants is selling is services and not goods, so the tax applicable is service tax which stands on the same bracket as sales tax in terms of services rendered as sales tax holds for goods sold. We have also observed that the AO had pointed out that the said amount has been included as business receipts in its TDS Certificates and as such, the same should have been included in its receipts. This has not been precisely done by the assessee. The case laws relied on by the assessee is dealt with as under:

(i) ACIT v. Real Image Media Technologies (P) Ltd. (ITATChennai):

7.2.1 The assessee was running a recording and dubbing studio, production of advertisement, films and television serials etc., as well as in software development. The amount of service tax included in bills issued but not received. Accordingly, the Hon'ble Tribunal had recorded its findings that 'As per s. 68 of Finance Act, 1994 read with rule 6 of Service Tax Rules, 1994, the service tax becomes payable only on receipt of service tax from the client. Therefore, the amount of service tax included in bills but not received could not be disallowed under s. 43B'. After analysing the relevant provisions of Incometax Act as well as Service Tax Act, the Tribunal had, further, recorded its findings as under:

> *"12.....From a plain reading of the above provision it becomes clear that the rigour of this provision would be attracted only in a case where an item is allowable as deduction but because of the failure to make payment such deduction will not be allowed. It can be argued that in the case of ST also the assessee does not claim deduction since it has been held that non-payment of Sales-tax would attract provisions of section 43B, but that is being done on the basis of the principles laid down by the Hon'ble Supreme Court in the case of Chowranghee Sales Bureau Ltd. V CIT 110 ITR 385 that Sales-tax is part of the trading receipt. Further, section 145A clearly provides that for the purpose of determining income under the head profits and gains of business or profession, the amount of purchase and*

sales i.e. turnover would include any tax, duty cess or fee. Therefore, the rigour of section 43B may be applicable in the case of Sales-tax or Excise Duty but the same cannot be said to be the position in case of Service-tax because of two reasons. Firstly, the assessee is never allowed deduction on account of service tax which is collected on behalf of the Govt. and paid to the Govt. accordingly. Therefore, a service provider is merely acting as an agent of the Govt. and is not entitled to claim deduction on account of service tax. Hence, on this account alone addition u/s 43B could not be made and the same has been correctly deleted by the CIT(Appeals)".

However, in the instant case, as admitted by the assessee, service tax has been collected but not paid to the Government account either up-to the end of the financial year or even up-to the date of filing of the return of income. Thus, the case law relied on by the assessee is distinguishable and cannot come to the rescue of the assessee.

(ii) CIT v. Noble and Hewitt India (P) Ltd (Del)

7.2.2 The Hon'ble Delhi High Court was predominantly concerned with the disallowance of deduction by invoking the provisions of section 43B of the Act. The Hon'ble Delhi High Court was not considering the issue whether the service tax collected and the remaining unpaid till the due date of furnishing of the return forms the part of the total income for the current year.

(iii) DCIT v Manish M Chheda 29 SOT 138 – Mumbai ITAT

7.2.3 In the above case, the Hon'ble Mumbai Tribunal was considering the applicability of section 28(iv) of the I T Act. In the instant case, it is an admitted fact that during the course of assessee's profession, a sum of Rs.29,60,000/- was realised/collected as service tax payable and the same is not capital receipt. The moment the service tax is realised, it becomes payable to the Govt. account and if it is not paid, it partakes the character of income of the assessee, since the assessee could utilise this amount in any manner whatsoever, there is no restriction placed on its utilisation. This is amply clear from the TDS certificate furnished by the assessee and also the credit appearing in the assessee's bank account. Therefore, to arrive at the professional income, the service tax realized should have been included in the gross receipts unless paid to Government exchequer

within the due date of filing of return. Since service tax realised is included in the total income, the same is to be allowed as a deduction in the year it is paid to the Government account. In the instant case, this is what has been done by the learned CIT(A). The CIT(A) had allowed the alternative plea of the assessee and had directed the Assessing Officer to deduct the service tax when the payment is made to the Govt. account in the subsequent year. Therefore, we find there is no merit in the contention raised on behalf of the assessee and this issue is decided against the assessee. It is ordered accordingly."

4.1 Further, in the case of M/s. Hemkunt Infratech (P) Ltd. v. DCIT [ITA No.6683/Del/2017 – order dated 23.03.2018, the Delhi Benches of the Tribunal held as under: -

"6. After hearing both the sides and perusing the entire material available on record, we observe that there is a credit balance of Rs.1,16,09,924/- at the end of the year towards expenses payable. The assessee submitted that it is service tax liability, which arose due to crediting the service tax received from the service recipients. The assessee has challenged before us, the disallowance of Rs.85,26,467/- disallowed u/s. 43B of the Act. We observe that the assessee has recorded his turnover after deducting the service tax received and the service tax has been credited separately. In section 145, of the Act for determining the income chargeable under the head profits and gains of business or profession or income from other sources, the same is to be computed in accordance with either cash or mercantile system of accounting regularly employed by the assessee. The said provisions were substituted by the Finance Act, 1995 w.e.f. 01.04.1997. Under section 145A of the Act, it is provided that notwithstanding anything to the contrary contained in clause(a) to section 145, the valuation of purchase and sale of goods and inventory, for the purpose of determining the income chargeable under the head profits and gains of business or profession, shall be (i) in accordance with method of accounting regularly employed by the assessee; and (ii) further adjusted to include the amount of any tax, duties, cess or fees, by whatever name called, actually paid or incurred by the assessee, to bring the goods to the place of its location and condition, as on the date of valuation. As per the explanation under the said clause, it is pointed out that for the purpose of this section, any tax, duties, cess or fees, by whatever name called, under any law for the time being in force, shall include all such payments, notwithstanding any right arising as a consequence to such payments. Sub-clause (b) talks of interest received by the assessee on compensation or enhanced compensation, which is not relatable to the issue

before us. The aforesaid provisions of section 145A of the Act have been substituted by the Finance (No.2) Act, 2009 w.e.f. 01.04.2010. Prior to its substitution, which was inserted by the Finance (No.2) Act, 1998 w.e.f. 01.04.1999, the section provided the provision relatable to the valuation of purchase and sale of goods and inventory, for the purpose of determining the income chargeable under the head profits and gains of business or profession and no clause (b) was provided i.e. in respect of income received by the assessee on compensation or on enhanced compensation. In view of the amended provisions of the Act, which came into effect from 01.04.1999 for valuing the purchases and sales of goods and also for valuing the inventory, while determining the income chargeable under the head profits and gains of business or profession, it has been provided that the said valuation would be in accordance with the method of accounting regularly employed by the assessee i.e. either mercantile or cash. Further, adjustment is to be made to include the amount of any tax, duties, cess or fees, by whatever name called, actually paid or incurred by the assessee to bring the goods to the place of its location and condition, as on the valuation date. In other words, where any expenditure is actually paid or incurred by the assessee by way of any tax, duties, cess or fees, by whatever name called, then adjustment is to be made both in the valuation of purchase and sale of goods and also in the valuation of inventory to include the aforesaid amounts while determining the income chargeable under head profits and gains of business or profession. The assessee has separately accounted for the service tax collected is also the indirect part of turnover because it is received along with turnover. The assessee has not shown any invoice raised by him before us as per service tax Rules, which is mandatory for the service provider to issue invoice to the service recipient. He has also not produced any evidence regarding payment received from service recipients as to how they have paid - separately or inclusive of service Tax. He has also not produced any evidence regarding whether the TDS has been remitted on payment after excluding the service tax. After going through the paper book filed by the assessee, we observe that the assessee has utilized service tax credit towards payment of duty on capital goods and as per Reverse Charge Mechanism. Therefore, it is necessary to discuss the relevant provisions of the Cenvat Credit Rules, 2004 as well as section 43B of the IT Act.

7. Section 43B(a) is as under :

43B. Notwithstanding anything contained in any other provision of this Act, a deduction otherwise allowable under this Act in respect of—

(a) any sum payable by the assessee by way of tax, duty, cess or fee, by whatever name called, under any law for the time being in force, or 8. Rule 4 of the CENVAT Credit Rules, 2004 reads as under :

Rule 4. Conditions for allowing CENVAT credit.-
(1) The CENVAT credit in respect of inputs may be taken immediately on receipt of the inputs in the factory of the manufacturer or in the premises of the provider of output service:

Provided that in respect of final products, namely, articles of jewellery falling under heading 7113 of the First Schedule to the Excise Tariff Act,the CENVAT credit of duty paid on inputs may be taken immediately on receipt of such inputs in the registered premises of the person who get such final products manufactured on his behalf, on job work basis, subject to the condition that the inputs are used in the manufacture of such final product by the job worker.

(2) (a) The CENVAT credit in respect of capital goods received in a factory or in the premises of the provider of output service at any point of time in a given financial year shall be taken only for an amount not exceeding fifty per cent. of the duty paid on such capital goods in the same financial year:

Provided that the CENVAT credit in respect of capital goods shall be allowed for the whole amount of the duty paid on such capital goods in the same financial year if such capital goods are cleared as such in the same financial year.

Provided further that the CENVAT credit of the additional duty leviable under sub-section (5) of section 3 of the Customs Tariff Act, in respect of capital goods shall be allowed immediately on receipt of the capital goods in the factory of a manufacturer.

Provided also that where an assessee is eligible to avail of the exemption under a notification based on the value of clearances in a financial year, the CENVAT credit in respect of capital goods received by such assessee shall be allowed for the whole amount of the duty paid on such capital goods in the same financial year.

Explanation. - For the removal of doubts, it is hereby clarified that an assessee shall be "eligible" if his aggregate value of clearances of all excisable goods for home consumption in the preceding financial year computed in the manner specified in the said notification did not exceed rupees four hundred lakhs.

(b) The balance of CENVAT credit may be taken in any financial year subsequent to the financial year in which the capital goods were received in the factory of the manufacturer, or in the premises of the provider of output service, if the capital goods, other than components, spares and accessories, refractories and refractory materials, moulds and dies and goods falling under heading 6805, grinding wheels and the like, and parts thereof falling under heading 6804 of the First Schedule to the Excise Tariff Act, are in the possession of the manufacturer of final products, or provider of output service in such subsequent years.

Illustration. - A manufacturer received machinery on the 16th day of April, 2002 in his factory. CENVAT of two lakh rupees is paid on this machinery. The manufacturer can take credit upto a maximum of one lakh rupees in the financial year 2002-2003, and the balance in subsequent years.

(3) The CENVAT credit in respect of the capital goods shall be allowed to a manufacturer, provider of output service even if the capital goods are acquired by him on lease, hire purchase or loan agreement, from a financing company.

(4) The CENVAT credit in respect of capital goods shall not be allowed in respect of that part of the value of capital goods which represents the amount of duty on such capital goods, which the manufacturer or provider of output service claims as depreciation under section 32 of the Income-tax Act, 1961(43 of 1961).

(5) (a) The CENVAT credit shall be allowed even if any inputs or capital goods as such or after being partially processed are sent to a job worker for further processing, testing, repair, re-conditioning, or for the manufacture of intermediate goods necessary for the manufacture of final products or any other purpose, and it is established from the records, challans or memos or any other document produced by the manufacturer or provider of output service taking the CENVAT credit that the goods are received back in the factory within one hundred and eighty days of their being sent to a job worker and if the inputs or the capital goods are not received back within one hundred eighty days, the manufacturer or provider of output service shall pay an amount equivalent to the CENVAT credit attributable to the inputs or capital goods by debiting the CENVAT credit or otherwise, but the manufacturer or provider of output service can take the CENVAT credit again when the inputs or capital goods are received back in his factory or in the premises of the provider of output service.

(b) The CENVAT credit shall also be allowed in respect of jigs, fixtures, moulds and dies sent by a manufacturer of final products to,-

(i) another manufacturer for the production of goods; or (ii)a job worker for the production of goods on his behalf, according to his specifications.

(6) The Deputy Commissioner of Central Excise or the Assistant Commissioner of Central Excise, as the case may be, having jurisdiction over the factory of the manufacturer of the final products who has sent the input or partially processed inputs outside his factory to a job-worker may, by an order, which shall be valid for a financial year, in respect of removal of such input or partially processed input, and subject to such conditions as he may impose in the interest of revenue including the manner in which duty, if leviable, is to be paid, allow final products to be cleared from the premises of the job-worker.

(7) The CENVAT credit in respect of input service shall be allowed, on or after the day which payment is made of the value of input service and the service tax paid or payable as is indicated in invoice, bill or, as the case may be, challan referred to in rule 9.

9. As per Rule 6(1) of the Service Tax Rules, 1994, in case of company, service tax is to be paid on a monthly basis by 5th of the following month (in case of e-payment, by 6th of the month immediately following the respective month). However, the payment for the month of March is required to be made by 31st of March itself. As per Rule 6(4) of the Service Tax Rules, 1994, the assessee can pay for provisional payment of service tax in case he is not able to correctly estimate the tax liability. In such a situation, he may request in writing to the jurisdictional Assistant/Dy. Commissioner for the same.

10. As per section 73A of the Finance Act, 1994, any person who has collected any sum on account of Service Tax, is under obligation to pay the same to the Government. He cannot retain the sum so collected with him by contending that the service tax is not payable. 11. As per section 173A of the Service Tax Act, in case, the service tax is collected, the provision is as under:

> *173A. Service Tax collected from any person to be deposited with Central Government: -*
>
> (1) Any person who is liable to pay service tax under the provisions of this Chapter or the rules made thereunder, and has collected any amount in excess of the service tax assessed or determined and paid on any taxable service under the provisions of this Chapter or the rules made there under from the recipient of taxable service in any manner as representing service tax, shall forthwith pay the amount so collected to the credit of the Central Government.
>
> (2) Where any person who has collected any amount, which is not required to be collected, from any other person, in any manner as representing service tax, such person shall forthwith pay the amount so collected to the credit of the Central Government.
>
> (3) Where any amount is required to be paid to the credit of the Central Government under sub-section (1) or sub-section (2) and the same has not been so paid, the Central Excise Officer shall serve, on the person liable to pay such amount, a notice requiring him to show cause why the said amount, as specified in the notice, should not be paid by him to the credit of the Central Government.
>
> (4) The Central Excise Officer shall, after considering the representation, if any, made by the person on whom the notice is served under subsection (3), determine the amount due from such person, not being in excess of the amount specified in the notice, and thereupon such person shall pay the amount so determined.
>
> (5) The amount paid to the credit of the Central Government under subsection (1) or subsection (2) or sub-section (4), shall be adjusted against

the service tax payable by the person on finalisation of assessment or any other proceeding for determination of service tax relating to the taxable service referred to in sub-section (1).

(6) Where any surplus amount is left after the adjustment under subsection (5), such amount shall either be credited to the Consumer Welfare Fund referred to in section 12C of the Central Excise Act, 1944 or, as the case may be, refunded to the person who has borne the incidence of such amount, in accordance with the provisions of section 11B of the said Act and such person may make an application under that section in such cases within six months from the date of the public notice to be issued by the Central Excise Officer for the refund of such surplus amount.]

12. We further observe that the point of taxation as per Rule 3 of Point of Taxation Rules, 2011 is as under:

RULE 3. Determination of point of taxation. - (Notification No. 18/2011-ST dt. 01.03.2011 as amended).

For the purposes of these rules, unless otherwise provided, point of taxation shall be, -

(a) the time when the invoice for the service provided or agreed to be provided is issued:
Provided that where the invoice is not issued within the time period specified in rule 4A of the Service Tax Rules, 1994, the point of taxation shall be the date of completion of provision of the service.

(b) in a case, where the person providing the service, receives a payment before the time specified in clause (a), the time, when he receives such payment, to the extent of such payment:

Provided that for the purposes of clauses (a) and (b), -

(i) in case of continuous supply of service where the provision of the whole or part of the service is determined periodically on the completion of an event in terms of a contract, which requires the receiver of service to make any payment to service provider, the date of completion of each such event as specified in the contract shall be deemed to be the date of completion of provision of service;

(ii) wherever the provider of taxable service receives a payment up to rupees one thousand in excess of the amount indicated in the invoice, the point of taxation to the extent of such excess amount, at the

option of the provider of taxable service, shall be determined in accordance with the provisions of clause (a).

Explanation - For the purpose of this rule, wherever any advance by whatever name known, is received by the service provider towards the provision of taxable service, the point of taxation shall be the date of receipt of each such advance."

13. After considering the above provisions, it is clear that the assessee has to pay service tax within due date as set out under the above provisions either by way of cash/cheque or by way of availing CENVAT credit as per Rules as stated above, but the assessee did not do so. The liability of service tax had also arisen as per the point of Taxation Rules, as stated above.

14. Now, we have to examine the case of the assessee in the light of the above provisions. During the impugned year, the assessee has credit balance of service tax payable as on 31.03.2013 of Rs.1,16,09,924/- which was to be paid up to 31.03.2013 by the assessee, but he did not pay. Further, the assessee had paid a sum of Rs.30,83,457/- before filing of IT return. As per section 43B(a), the above outstanding payment was to be paid up to the date of filing of return of income. As per method of accounting, the assessee has also not included the service tax received by him in the turnover. In fact, the assessee was legally obliged to declare its turnover inclusive of service tax received. The assessee cannot be exonerated from its liability by saying that he accounted for the service tax received separately. Since the assessee did not pay service tax as contemplated u/s. 43B(a) and as per above provisions of Service Tax Act within the stipulated time, therefore, the ld. CIT(A) has rightly disallowed the same u/s. 43B of the IT Act. The case laws relied by the assessee are based on different footings as in all the decisions it was held that Service Tax was not at all payable because the service Tax was not received from the customer. The law prevailing at that particular time was that Service Tax was to be paid to the Government only when Service Tax is received from the service receiver to the service provider. Subsequently, there is change in the law which provides that Service Tax is to be deposited by the service provider even if service tax is not paid by the service receiver to the service provider. Therefore, in all those decisions it was held that service tax outstanding is hit by the provisions of Section 43B of the Income Tax Act. 1961. Due to the change in the law now those decisions do not help to the assessee. Moreover, the assessee has filed the service tax returns belatedly, i.e., for April to June on 16.04.2015, for July to

> September and half yearly from October to March, 2013 on 08.07.2015. In view of all these facts, the ld. CIT(A) has rightly dealt with the issue in question by giving elaborate findings in the impugned order regarding confirmation of addition u/s. 43B of the Act, which we do not find fit to be interfered with. Accordingly, the appeal of the assessee deserves to be dismissed."

4.2 In view of the above binding precedents, we are of the view that the service tax collected by the assessee and not paid to the Government exchequer before the due date of filing of return, is to be disallowed, though it was not charged to the profit and loss account and it attracts the provisions of section 43B of the Act and the present provisions of section 145A of the Act cannot be applied in view of non obstante clause in section 43B of the Act. Thus, this ground of appeals of the Revenue for both the assessment years is allowed.

5. The next common ground of the Revenue is with regard to disallowance of proportionate interest on borrowed funds.

5.1 The facts of the case are that for the assessment year 2012-13, the Assessing Officer found that there were outstanding loan balances given to sister concerns free of interest. It was found that the assessee had not furnished the breakup of interest paid/payable and also provided evidence that no part of the interest claimed by it related to loans diverted free of interest to subsidiary/associate concerns. The Assessing Officer had verified that borrowed funds had been diverted free of interest to the sister concerns. At the same time, the assessee had incurred interest

expenses on its borrowings and therefore, the Assessing Officer disallowed proportionate interest expense claim, treating them as non-business expenditure and added to the total income.

5.2. Before the CIT(A), the assessee submitted that these loans were advanced to sister concerns during earlier years and nothing was advanced during current year free of interest. The assessee also submitted that the company had a net reserve of Rs.16,18,20,075/- compared to loan given amounting to Rs.1,53,47,130/- and therefore, it cannot be said that the interest free loans were advanced to sister concerns out of borrowed funds. Apart from this, the assessee also submitted that the term loans were taken for specific purposes and no part of the same could be diverted for any other purpose. The assessee also submitted that the company is engaged in construction activities for the projects executed by Kunnel Projects Pvt. Ltd. and there was commercial expediency in advancing the loans. The CIT(A) observed that the Assessing Officer had made the disallowance in a routine and mechanical manner without examining the facts and appreciating the explanation of the assessee. The CIT(A) observed that assessee's reserves and surplus were much higher than the interest free advances given to the sister concerns and the Assessing Officer has not made any effort to establish the linkage between the borrowed funds and the interest free loans given to sister concerns. Under these circumstances, the CIT(A) deleted the disallowance made by the Assessing Officer.

5.3 Against this, the Revenue is in appeal before us. The Ld. DR submitted that the assessee has not established the availability of own funds on account of commercial expediency. Without examining these facts, the CIT(A) had allowed the claim of the assessee which is bad in law.

5.4 The Ld. AR submitted that the assessee had net reserves of Rs.16,18,20,075/- which is far in excess of the amounts advanced to the related companies. The cash and bank balances available with the Company also far exceed the amounts advanced. Therefore, the assessee had sufficient amount of interest free funds which was used for advancing to the sister companies. It was submitted that these loans were taken for the purpose of funding specific assets and were paid directly to the supplier of the assets. Thus, it was submitted that there was no question of diversion of funds in the case of term loans. The Ld. AR submitted that creditors alone amount to Rs.13.26 crores at end of March 2011. If at all the disallowance is to be made, it should be made only after considering the availability of these funds to the assessee. The Ld. AR submitted that Kunnel Projects Private Limited is a sister concern of the assessee with similar shareholding. Further, the assessee is engaged in the constructions activities for the projects executed by Kunnel Projects Private Limited and the funds were transferred for commercial expediency. The amounts were advanced to the company as they had difficulty raising debt funds from banking institutions as generally the construction industry is not given loans. In support of his contentions, the Ld. AR relied on the following judgments:

1. CIT vs. Alappatt Brothers (ITA No.1341/2009 dated 06/06/2016) (Ker.)
2. S.A. Builders Ltd. vs. CIT (288 ITR 1) (SC)
3. CIT vs. V.I. Baby and Co. (254 ITR 248) (Ker.)
4. Madhav Prasad Jantia vs. CIT (AIR 1979 SC 129)
5. Eastern Investments Ltd. vs. CIT (20 ITR 1) (SC)
6. CIT vs. Chandulal Keshavlal & Co. (38 ITR 601) (SC)
7. Phaltan Sugar Works Ltd. vs. CWT (208 ITR 989) (Bom.)
8. Phaltan Sugar Works Ltd. vs. CWT (215 ITR 582) (Bom.)
9. CIT vs. Dalmia Cement (Bharat) Ltd. (254 ITR 377) (Del.).
10. CIT vs. Malayalam Plantations Ltd. (53 ITR 140) (SC)

6. We have heard the rival submissions and perused the record. We find that the assessee has not established in the cash flow statements about the availability of enough own funds at the time of making investments in the exempted income yielding assets. Hence, it is appropriate to verify the fact whether enough own funds are available with the assessee as on the date of making investments in the exempted income yielding assets. Being so, the assessee is directed to produce cash flow statements showing availability of enough own funds for making such investments with supporting documents which have to be examined by the Assessing Officer before making disallowance. Accordingly, we remit this entire issue in dispute to the file of the Assessing Officer for fresh consideration with a direction to the assessee to produce relevant cash flow statements to show that interest free funds were available with the assessee to make such investments. With this observation, this ground of appeals of the Revenue is partly allowed for statistical purposes for both the assessment years.

7. The next ground of the Revenue is with regard to depreciation on undivided share of land treating them as cost paid towards building.

7.1 The facts of the case are that during the previous year, the assessee had shown addition to building amounting to R.1,36,67,500/-. From the copy of agreement submitted for purchase, the Assessing Officer noticed that the assessee had purchased Flats numbered 1A and 1B, Royal Cronet. The payment for undivided share of land was Rs.6,30,000/- and Rs.10,10,000/- respectively. The assessee had claimed depreciation on these amounts by treating them as cost paid towards building. The amount of such depreciation works out to Rs.1,64,000/- and the same is being disallowed and added to the total income as land is not an asset on which depreciation can be allowed.

7.2 On appeal, the CIT(A) observed that in the case of purchase of a flat, the flat and undivided share of land in the society are inseparable. Only the flat is identifiable and not the undivided share in land. Hence, the CIT(A) deleted the disallowance in respect of undivided share of land.

7.3 Against this, the Revenue is in appeal before us. The Ld. DR submitted that Companies purchase commercial property in order to accommodate an expanding workforce and acquire a more permanent physical presence. According to the Ld. DR, such transactions regularly involve the purchase of one or more plots of land

together with office building(s), or alternatively, buildings may be constructed on the land by the purchaser subsequently and once the building is in use, the assessee-company is entitled to claim depreciation on the same at the prescribed rates in force (presently, 10%). The Ld. DR submitted that the two assets - land and building are distinguishable from each other, and such distinction is important for the purposes of correctly determining the amount of depreciation claimable by the assessee. The Ld. DR was of the view that land is not a depreciable asset and by its very definition, depreciation means decrease in the value of an asset through wear and tear, deterioration or obsolescence. The Ld. DR opined that while these implications easily apply to buildings or other structures built upon land, the land itself as an asset has no finite life. The Ld. DR referred to Section 32 of the Income Tax Act, 1961. Section 32 (1) states:

> *[In respect of depreciation of-*
>
> *(i) Buildings, machinery, plant or furniture, being tangible assets*
>
> *(ii) Know-how, patents, copyrights, trademarks, licenses, franchises or any other business or commercial rights of similar nature, being intangible assets acquired on or after the 1st day of April, 1998,*
>
> *owned, wholly or partly, by the assessee and used for the purposes of the business or profession, the following deductions shall be allowed* .....]

7.4 The Ld. DR submitted that in Part (i), the Section refers specifically to Buildings. Nowhere is any reference made towards Land. The Ld. DR relied on the judgment of the Supreme Court in the case of CIT vs. Alps Theatre wherein the Supreme Court, overturning the decision of the Punjab & Haryana High Court, ruled that -

'Building does not include the site because there cannot be *any question o*f *destruction of site.... Depreciation means decrease in value of property through wear, deterioration or obsolescence.* (Webster's New Word Dictionary). *In that* sense, *land cannot depreciate. Depreciation is allowable only on the value of superstructure on the land and not on the value of land."* The Ld. DR relied on the judgment of the Rajasthan High Court in the case of CIT vs. Vimal Chand Golecha) wherein it was held that "Land *is a capital asset in terms of Section 2(14) of the Act and, in accordance with the scheme of the Act, it is treated as* a *separate asset. Even for the purpose of Section 32,* a *building which is entitled for depreciation would mean only the superstructure and would not include the site."*

7.5 Thus, in view of the aforementioned judgments, the Ld. DR submitted that it is clear that in a case where the value of building and the value of the land on which it is built is separately identifiable, assessees must determine the depreciation on the value of the building only, at the rates specified as per Rule 5 of the Income Tax Rules, 1962. Depreciation debited to the Profit and Loss Account which pertains to the value of the land is liable to be disallowed by the Assessing Officer.

7.6 However, the Ld. DR submitted that confusion often arises where separate values for land and building cannot be identified e.g. in the case of composite Sale Agreements where purchase of property has been made by businessmen / companies wherein the particulars of the Agreement mention a standalone

consideration with no bifurcation made between the amount attributable to the value of the land and that to the value of the building. In such cases, what shall be the basis for charging depreciation? The Ld. DR submitted that the above issue has been a matter of contention between Revenue and assesses and there appear to be two conflicting judgments on the same. The Ld. DR relied on the judgment of the ITAT, Bengaluru in the case of CIT v. Rajesh Exports Ltd. the Tribunal ruled that *"Where the* assesses purchases a *building and the purchase price (as per sale deed) is a composite one (sale deed does not indicate the prices of land and building separately), then no distinction at least in the consideration paid to the vendor can be made. However, if there is a clear-cut identity in respect of price paid to the land and building (i.e., the sale deed indicates price of land and building separately), then depreciation is available only on the building."* The inference that is made from this judgment is that in cases where there is a composite purchase price, the entire amount can qualify for depreciation.

7.7 Contrary to this judgment of thee ITAT, Bengaluru, the Ld. DR submitted that ITAT, Mumbai in the case of Burgmann India Pvt. Ltd. ruled that "*Land despite forming part of the composite unit, does not* merge *with the building, and retains its independent identity.... The mere non specification of separate values would not enable allowance of deprecation on an asset (land) on which depreciation is not otherwise exigible. Any view to the contrary would promote the mischief of not specifying the values separately, which is the basis on which valuation is normally*

done." According to the Ld. DR, the Mumbai Bench of the ITAT has suitably pointed out that merging of land and building for this purpose could possibly lead to the creation of a loophole, whereby purchase agreements are deliberately made on a composite value, so as to enable assesses to claim depreciation on an enhanced amount. The Ld. DR concluded that in the present scenario, it is clear that there is no definitive answer as yet on the subject of depreciation on land in cases involving unsegregated value between land and building.

7.8 The Ld. AR submitted that the company had acquired an apartment alongwith undivided share of land. Depreciation was charged on the entire asset as per the rates specified in the Income Tax Act. The Ld. AR submitted that unlike other residential properties such as houses, in the case of apartments, the undivided share of land cannot be sold separately from the apartment itself. Further, it was separately identifiable. The Ld. AR submitted that the undivided share of land was registered in the name of the assessee only for the purpose of compliance from the point of view of the local registrar's office and further, building tax was paid based on the built up sq. ft. of an apartment and not based on the undivided share of land.

8. We have heard the rival submissions and perused the material on record. The assessee has shown the land as undivided share of land separately in the block of assets which is not entitled for depreciation. The CIT(A) is not justified in granting

depreciation on the undivided share of land. Accordingly, we vacate the findings of the CIT(A) on this issue. Thus, this ground of appeals of the Revenue for both the assessment years is allowed.

9. In the result, the appeals filed by the Revenue are partly allowed for statistical purposes.

Order pronounced in the open court on 19th May, 2020.

sd/-	sd/-
(GEORGE GEORGE K.)	(CHANDRA POOJARI)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Place: Kochi
Dated: 19th May, 2020
GJ
Copy to:
1. M/s. Kunnel Engineers & Contractors (P) Ltd., 3rd Floor, Puthuran Plaza, M.G. Road, KPCC Junction, Kochi-682 011.
2. The Assistant Commissioner of Income-tax, Corporate Circle-1(2), Kochi
3. The Commissioner of Income-tax (Appeals)-I, Kochi.
4. The Pr. Commissioner of Income-tax, Kochi.
5. D.R., I.T.A.T., Cochin Bench, Cochin.
6. Guard File.

By Order

(ASSISTANT REGISTRAR)
I.T.A.T., Cochin