

IN THE INCOME TAX APPELLATE TRIBUNAL
"A" Bench, Mumbai
Before Shri Shamim Yahya (AM) & Shri Pavan Kumar Gadale (JM)

I.T.A. No. 3124/Mum/2019 (Assessment Year 2015-16)

Avacend Solutions Pvt.Ltd. 302/A, Sagar Tech Plaza Andheri Kurla Road Saki Naka Junction Andheri(E) Mumbai-400 072 PAN : AAECA3188Q (Appellant)	Vs.	ITO-9(1)(4) Room No.205, 2 nd Floor Aaykar Bhawan M.K.Road Mumbai-400 020 (Respondent)
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Assessee by	None
Department by	Shri Brajendra Kumar
Date of Hearing	12.07.2021
Date of Pronouncement	28 .09.2021

O R D E R

Per Shamim Yahya (AM) :-

This appeal by the Assessee is directed against the order of learned CIT(A)-16 dated 28.03.2019 and pertains to Assessment Year 2015-16.

2. The grounds of appeal read as under :

1. The learned Commissioner of Income-Tax (Appeals)-16 committed an error of law and fact in rejecting the appellant's submissions in statement of facts made along with the grounds of the appeal while filing the appeal.
2. The learned Commissioner of Income-Tax (Appeals) erred in arriving to the conclusion that the unpaid service tax amount of Rs. 1,00,95,312/- which is not routed through Profit & Loss A/c and shown as a liability in the Balance Sheet is correctly disallowed by the ITO. u/s. 43B.
3. On the facts & circumstances of the case the learned CIT (A) is not justify in confirming the addition on account of service tax amounting to Rs. 1,00,95,312/- u/s. 43B of the Income Tax Act.

3. Brief facts of the case are that the return of income was e-filed for the AY 2015-16 on 27.11.2015 declaring total income at Rs.28,20,560/-. The case was selected for scrutiny and an assessment order u/s. 143(3) was passed on 29.12.2017 determining the total income of the appellant of Rs. 1,47,26,330/- by making an addition of Rs.18,10,455/- on account of disallowance on account of non-payment of contributions received from employees for various funds u/s. 36(1)(va) and Rs.1,00,95,312/- on account of non-payment of service tax u/s. 43B of the Act.
4. Upon assessee's appeal Ld.CIT(A) deleted the addition qua issue of 36(1)(va). However, qua the issue of disallowance u/s. 43B, he noted inter alia assessee's reliance of Hon'ble jurisdictional High Court as under:-

CIT vs. Ovira Logistics Private Limited, IT Appeal No: 1023 of 2013.

In this case findings of the ITAT were upheld by the Mumbai high Court and observed that since the assessee did not debit the amount to the Profit & Loss Account as an expenditure nor did the assessee claim any deduction in respect of the amount since the assessee was following the mercantile system of accounting, the question of disallowing the deduction not claimed does not arise.

5. However, Ld.CIT(A) confirmed the addition choosing not to follow Hon'ble jurisdictional High Court, but referred to Hon'ble Andhra Pradesh High Court in the case of Srikakollu Subba Rao & Co & Ors v. Union of India & Ors (1988) 71 CTR (AP) 34 : (1988) 173 ITR 708 (AP).
6. Against this order, assessee is in appeal before us.
7. We have heard the Ld. DR and perused the record. We find that Ld.CIT(A) without mentioning any reason has chosen not to follow Hon'ble Bombay High Court on the issue. In the said Hon'ble Bombay High Court decision it was held that "having perused the aforesaid decisions, we are clearly of the view that section 43B

does not contemplate liability to pay the service tax before actual receipt of the funds in the account of the assessee. In our view, liability to pay service tax into the treasury will arise only upon the assessee receiving the funds and not otherwise. Accordingly, when service are rendered, the liability to pay the service tax in respect of the consideration payable will arise only upon the receipt of such consideration and not otherwise.” Accordingly, we remit the issue to the file of AO. The AO shall examine the issue and if amount has not been received by the assessee, no disallowance can be done on the ratio of above Hon’ble Bombay High Court decision.

8. In the result, this appeal by the assessee is allowed for statistical purpose.

Pronounced in the open court on 28.09.2021.

Sd/-
(PAVAN KUMAR GADALE)
JUDICIAL MEMBER

Sd/-
(SHAMIM YAHYA)
ACCOUNTANT MEMBER

Mumbai; Dated : 28/09/2021
Thirumalesh, Sr.PS

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT(A)
4. CIT
5. DR, ITAT, Mumbai
6. Guard File.

//True Copy//

BY ORDER,
(Assistant Registrar)
ITAT, Mumbai