

**IN THE INCOME TAX APPELLATE TRIBUNAL
'C' BENCH : BANGALORE**

**BEFORE SHRI GEORGE GEORGE K., JUDICIAL MEMBER
AND MS. PADMAVATHY S, ACCOUNTANT MEMBER**

ITA No.2561/Bang/2019
Assessment year : 2017-18

M/s Geotrix Building Envelope Pvt. Ltd., Unit No.201, 2 nd Floor, No.16, Phoenix Victoria, Victoria Road, Bengaluru-560047. PAN – AAECG 2317 D	Vs.	The Dy. Commissioner of Income-tax, CPC, Bengaluru.
APPELLANT		RESPONDENT

Assessee by	:	Shri Ramasubramaniyan and Shri Sandeep, C.As
Revenue by	:	Shri Priyadarshini Basaganni, Addl. CIT(DR)

Date of hearing	:	05.05.2022
Date of Pronouncement	:	17.05.2022

ORDER

Per Padmavathy S, Accountant Member

This appeal is against the order of the Commissioner of Income Tax (Appeals)-3, Bengaluru dated 23/10/2019 for the asst. year 2017-18.

2. The assessee raised the following grounds:-

“1. That the order of the learned Commissioner of Income-Tax (Appeals) in so far prejudicial to the interests of the appellant is bad and erroneous in law and against the facts and circumstances of the case.

2. That the learned Commissioner of Income-Tax (Appeals) erred in law and on facts in sustaining the addition of Rs.2,75,27,619/- u/s. 43B of the Act even though such addition does not fall under the purview of section 143(1) of the Act.

3. That the learned Commissioner of Income-Tax (Appeals) erred in law and on facts in applying section 4313 of the Act and adding back the various taxes payable of Rs.2,75,27,619/- to the income on the ground that the above taxes have not been remitted before filing the return of income.

4. That the learned Commissioner of Income-Tax (Appeals) erred in law and on facts in sustaining the disallowance of Rs.2,75,27,619/- u/s 43B of the Act even though provisions of section 4313 are applicable only for the deductions otherwise allowable under the provisions of the Act and the appellant has not claimed the deduction.

5. Without prejudice to the above grounds, that the learned Commissioner of Income-Tax (Appeals) erred in law and on facts in sustaining the addition of VAT & CST payable of Rs. 46,99,607/- even though the same has been paid before filing the return of income.

6. Without prejudice to the above grounds, that the learned Commissioner of Income-Tax (Appeals) erred in law and on facts in sustaining the addition of Service tax payable of Rs. 1,37,35,310/- even though such service tax was not yet received from the respective parties.

7. Without prejudice to the above grounds. that the learned Commissioner of Income-Tax (Appeals) erred in law and on facts in sustaining the addition of Excise Duty payable to the extent of Rs. 17,20,281/- even though the same has been adjusted with the CENVAT credit before filing the return of income.

3. The brief facts of the case are that the assessee is a private limited company and for the asst. year 2017-18, the assessee filed a return of income on 30/10/2017 declaring a total income of Rs.1,97,79,530/-. An intimation u/s 143(1) of the Income-tax Act (the Act) was received by the assessee on 13/11/2018 determining a total income of Rs.4,73,07,150/-. The break-up of the additions made in the intimation received u/s 143(1) of the Act as follows:-

SI No	Particulars	Amount
1.	VAT & CST	46,99,607
2.	Excise Duty	90,92,702
3.	Service Tax	1,37,35,310
Total		2,75,27,619

4. The above amount payable was added back u/s 43B of the Act on the ground that it was not paid before filing the return of income.

5. Aggrieved, the assessee preferred an appeal before the CIT(A) who confirmed the addition made u/s 43B of the Act. Before the

CIT(A), the assessee submitted that the assessee is maintaining mercantile system of accounting. It had collected taxes during the previous year relevant to the asst. year. Out of the taxes so collected, the assessee had deposited part of the amount and balance was not deposited by the assessee with the concerned authorities. The assessee submitted that the assessee did not claim any deduction this amount as an expenditure in the profit and loss account. In this regard, the assessee placed reliance on the judgment of the Bombay High Court in the case of CIT(A) Vs. Knight Frank India Pvt. Ltd., in ITA No.255/Bom/2014 dated 16/08/2018.

6. The assessee also submitted before the CIT(A) that out of the total amount disallowed, the VAT amount of Rs.46,99,607/- was paid before the due date for filing the return of income. The CIT(A) partly allowed the appeal whereby he had issued directions to the AO to give another opportunity of being heard to the assessee so that the required documents can be produced in relation to the claim that certain amounts have already been paid and to check the amount of tax actually paid before the due date of filing the return of income and accordingly to re-compute the disallowance u/s 43B of the Act. With regard to Service Tax and Excise Duty CIT(A) was of the view that the assessed had not followed the correct accounting procedure. If it had done so, the amount would have had to be debited to Profit & Loss Account and thereafter the assessed could claim a deduction thereon. The Commissioner relied upon decision of the Calcutta High Court in

CIT vs Associated Pigments Ltd., (1193) 71 Taxman 244 (Cal) where the decision of the Hon'ble Supreme Court in the case of Chowringhee Sales Bureau (P) Ltd. v. CIT (1973) 87 ITR 542 and Sinclair Murray & Co (P) Ltd., vs CIT (1974) 97 ITR 615 is referred to.

7. Aggrieved by the order of the CIT(A), the assessee is in appeal before us. During the course of hearing, the ld.AR did not press for ground No.5 relating to VAT and CST payable of Rs.46,99,607/-. The CIT(A) has remitted this issue back to the AO for proper verification.

8. With regard to disallowance of service tax and excise duty, the ld.AR submitted that the said amounts have not been debited to the profit and loss account and hence no disallowance can be made u/s 43B of the Act. In this regard, the assessee relied on the decision of the co-ordinate bench of the Tribunal in the case of N.R Kumarswamy Vs. ACIT in ITA No.1778/Bang/2017. The contention of the ld.AR is that the provision of sec. 43B of the Act shall apply only if an item is claimed as deduction which is evident from the reading of initial part of sec.43B of the Act, which states that "**notwithstanding anything contained in other provisions of this Act, a deduction otherwise allowable**".....

9. The ld.DR supported the decision of the lower authorities. During the course of hearing, the ld.DR submitted that the assessee has

not proved before the AO that the unpaid amount of service tax and excise duty was not claimed as deduction in the profit and loss account of the assessee and the AO should have been granted an opportunity to examine whether unpaid service tax and excise duty have been claimed as a deduction in the profit and loss account. The Id.AR in rebuttal submitted that the matter can be restored to the AO for the limited purpose of examining whether unpaid service tax is claimed as a deduction in profit and loss account with a specific direction to decide the allowability as per law.

10. We heard the rival submission and perused the material on record. The major contention of the assessee for the disallowance made u/s 43B is that the impugned amount of service tax and excise duty is not debited to the profit and loss account and hence no disallowance is warranted u/s 43B of the Act. We will look at the relevant extract of section 43B of the Act which reads as follows –

43B. Certain deductions to be only on actual payment. 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 assessed by way of tax, duty, cess or fee, by whatever name called, under any law for the time being in force,

(b) to (g) ** ** * 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.

11. We notice that the Bombay High Court in the case of CIT Vs. Knight Frank India Pvt. Ltd. (Supra) where the Hon'ble Court has held that –

“Regarding question (ii) it is an admitted position before us that the assessee had not claimed any deduction on account of the service tax payable in order to determine its taxable income. In the above view, there can be no occasion to invoke Section 43B of the Act. The issue stands concluded against the Revenue by the decisions of this Court in Commissioner of Income Tax Vs. Ovira Logistics P. Ltd. 377 ITR 129 and Commissioner of Income Tax Vs. Calibre Personnel Services Pvt. Ltd. (Income Tax Appeal No. 158 of 2013) rendered on 2nd February, 2015”

12. Similar view is held by the Delhi High Court in the case of CIT vs Noble And Hewitt (I) (P) Ltd (2008) 305 ITR 324 (Delhi) has held that

5. Learned Counsel for the revenue urges that the decision of the Calcutta High court in Chowringhee Sales Bureau (P.) Ltd's case (supra) relied by the CIT(A) is distinguishable from assessee's case. In that case it was held that the liability to pay sales tax arose the moment a sale or purchase was effected and if an assessee was maintaining accounts on the mercantile system it would be entitled to deduction of the estimated liability of sales tax,

even though such sales tax had not been paid to the sales tax authorities. The question there concerned was the entitlement of the assessed to deduction under Sections 10(1) and 10(2)(xv) of the Indian Income Tax Act, 1922. The decision is clearly distinguishable in its application to the present case. Here we are concerned with an assessee who not even claimed any deduction on the ground of service tax and has not debited the amount to its Profit & Loss Account. Moreover the provisions of Section 43B of the Act are quite clear in this regard. The decision of the Calcutta High Court in Chowringhee Sales Bureau (P) Ltd. s case (supra) was not in the context of the applicability of Section 43B of the Act.

6. In our opinion since the assessed did not debit the amount to the Profit & Loss Account as an expenditure nor did the assessed claim 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.

7. Learned Counsel for the revenue submits that the assessed has sought to evade tax under the mercantile system of accounting. We are of the view that it is not for the revenue authorities to tell the assessed how to maintain its accounts.

13. In view of the above discussion it is clear that the important fact to be verified is whether the Service Tax and Excise Duty is claimed as a deduction by the assessee by way of debit to the Profit and Loss account of the assessee. This crucial fact is not verified by the lower authorities and hence we think it fit to remand this issue back to the AO to verify whether the service tax and excise duty is debited to the

profit and loss account. In the event, the same is not claimed as deduction or expenditure the AO shall not invoke the provision of sec. 43B of the Act in view of the decision of the Hon'ble High Courts in the case of Knight Frank India Pvt. Ltd. & Noble And Hewitt (I) (P) Ltd (Supra). It is ordered accordingly.

14. In the result, the appeal filed by the assessee is allowed for statistical purpose.

Order pronounced in court on 17th day of May, 2022

Sd/-

(GEORGE GEORGE K.)
Judicial Member

Sd/-

(PADMAVATHY S)
Accountant Member

Bangalore,
Dated, 17th May, 2022
/ vms /

Copy to:

1. The Applicant
2. The Respondent
3. The CIT
4. The CIT(A)
5. The DR, ITAT, Bangalore.

By order

Asst. Registrar, ITAT, Bangalore.